84-909

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

MUIGAWAH MUNUSAMY, STEPHEN PETER CROW, AND WAYNE PICCO, Petitioner (Plaintiffs)

(IN INITIAL PETITION STYLED
STEPHEN PETER CROW, MUIGAWAH MUNUSAMY, AND WAYNE PICCO, Petitioners, Plaintiffs)

v.

McCLELLAND ENGINEERS, McCLELLAND ENGINEERS S.A., McCLELLAND ENGINEERS, S.A.BHD. . . OCEANEERING INTERNATIONAL, S.A., OCEANEERING INTERNATIONAL A.G., OCEANEERING INTERNATIONAL BRUNEI, CROSBY OFFSHORE SERVICES, LTD., ARABIAN AMERICAN OIL COMPANY, GLOBAL MARINE,INC. AND GLOBAL MARINE DRILLING COMPANY, Respondents (Defendants)

Sub Nominee

In Re McCLELLAND ENGINEERS, INC.; McCLELLAND ENGINEERS, S.A.; McCLELLAND ENGINEERS, S.A. BHD.; OCEANEERING INTERNATIONAL INC.; OCEANEERING INTERNATIONAL A.G.; OCEANEERING INTERNATIONAL BRUNEI: CROSBY OFFSHORE SERVICES, LTD.; ARABIAN AMERICAN OIL COMPANY AND GLOBAL MARINE DRILLING COMPANY

AMENDED

PETITION FOR TEMPORARY STAY ORDER, WRIT OF PROHIBITION AND/OR MANDAMUS AND FOR STATUTORY AND/OR COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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POINTS UPON WHICH PETITIONS FOR TEMPORARY STAY ORDER, WRIT OF PROHIBITION AND/OR MANDAMUS AND FOR STATUTORY AND/OR COMMON LAW CERTIORARI ARE BASED

1. In Direct Violation Of Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33 (1980), The Court Of Appeals Clearly Erred By Issuing A De Facto Mandamus Directing The District Court To Certify An Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) With Respect To Its Order Denying Defendants' Forum Non Conveniens Motion Because The Court of Appeals Took such Extraordinary Action Without Having The Record and Transcript of The District Court Before It, After Only a 25 Day Cursory Examination Of The Opinion Of The District Court, Which It Conceded Stated Few Facts, And Without Allowing Oral Argument.

2. The District Court Having Exercised Its Discretion To Deny Certification Of Its Order Denying Defendants' Forum Non Conveniens Motion For Inter-

locutory Appeal Pursuant To 28 U.S.C. 1292(b), The Court Of Appeals Exceeded Its Power And Grieviously Erred In Issuing A De Facto Mandamus, Directing The District Court To Certify Such Order For Interlocutory Appeal.

3. Even If The Court of Appeals Had The "Power" In An Appropriate Case To Mandamus A Certification For Interlocutory Appeal, The Court of Appeals In This Particular Case Clearly Erred In Issuing A De Facto Mandamus Directing The District Court To Certify For Interlocutory Appeal, And In Granting The Interlocutory Appeal In Its Order of October 2, 1984, With Respect To The Order Of The District Court Denying Defendants' Forum Non Conveniens Motion, For The Following Reasons: (a) The District Court Properly Considered And Thoroughly Discussed All Of The Choice-of-Law And Forum Non Conveniens Factors Established By The Supreme Court;

(b) The Subordinate Choice-Of Law Question Involved Disputed Fact Issues And Was In Effect A Summary Judgment Determination; (c) Since The District Court Deferred Final Resolution Of The Choice-Of-Law Question Because Of The Existence Of Disputed Fact Issues And Indicated That Even If Foreign Law Applied It Would Still Exercise Its Discretion To Deny Defendants' Forum Non Conveniens Motion, The Choice-Of-Law Question Was Not "Ripe" For An Interlocutory Appeal And Did Not Present A Controlling Question Of Law; (d) The Overriding Forum Non Conveniens Question Involves The Discretion Of The District Court On A Matter Of Venue; (e) This Case Involves A Maritime Personal Injury Case That Falls Within The "Short-Trial" Concept And The Defendants Waited Until Just Before The Trial On The Merits To Seek A Mandamus; (f) The District Court's

Ruling That The Shipowner's Liability (Sick And Injured Seamen) Convention of 1936, 54 Stat 1693 ("SLSIS Treaty"), A Multilateral Treaty To Which The United States Is A Party, Required The Court To Treat Foreign Seamen On Vessels Beneficially Owned Or Operated By American Corporations The Same As American Seamen For Choice-Of-Law And Forum Non Conveniens Purposes, Did Not Present A Controlling Question Of Law About Which There Could Be Substantial Grounds For Difference Of Opinion Because The Language Of This Treaty Clearly Mandates Such Holding And It Was Only A Partial Basis For The District Court's Inclination To Apply American Law And To Hold That the Forum Non Conveniens Motion Should Be Denied -- It Being Clear That The Court Would Propably Have Reached The Sam Result Even if It Had Ignored The SLSIS Treaty; (g) The District

Court's Statements Concerning Choice-Of-Law And Rulings Concerning The Forum Non Conveniens Question Were Not Rulings About Which There Could Be Substantial Grounds For A Difference Of Opinion Because They Followed Existing Supreme Court Law In Holding That It Was Appropriate For The Court To Retain Jurisdiction And Venue Over These Cases Where The Direct Or Beneficial Jones Act Employer in Each Case Was An American Corporation With Its Home Office In Houston, Texas; The Beneficial Or Direct Owner-Operator Of The Vessel In Each Case Was That Same American Corporation With Its Home Office In Houston, Texas; The Direct Or Beneficial Flag-State Of The Vessel In Each Case Was The United States; And The Base Of Operations, As Defined By The Supreme Court in Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), Was, In Each Case, In Houston, Texas; And (h) The District Court's Decision

On The Forum Non Conveniens Motions Did Not Present A Ripe Decision, Consideration Of Which On Interlocutory Appeal Would Materially Advance Or Terminate The Litigation, Because Even If The District Court Should Have Refused To Apply The Jones Act And Dismissed The Defendants' Foreign Subsidiaries, It Still Had To Adjudicate Plaintiffs' Diversity-State Law/Foreign Law Claims Against The American Defendants, As Suggested By This Court In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND COURT OF APPEALS

Petitioners In This Court; Respondents In The Court Of Appeals And Plaintiffs In District Court (hereinafter "Plaintiffs")

Muigawah Munusamy
Stephen Peter Crow
Wayne Picco

Respondents In This Court; Petitioners In The Court Of Appeals and Defendants In The District Court (hereinafter "Defendants")

McClelland Engineers
McClelland Engineers, S.A.
McClelland Engineers, S.A. BHD.
Oceaneering International, Inc.
Oceaneering International A.G.
Oceaneering International Brunei
Crosby Offshore Services, Ltd.
Arabian American Oil Company
Global Marine, Inc.
Global Marine Drilling Company

Additional Respondent In Court Of Appeals:

Honorable Joe J. Fisher, U.S. District Judge (hereinafter "Judge Fisher")

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Appendix 8 - Excerpts From Responses of Respondents to Petition for Writ of Mandamus

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the district court dated January 30, 1984 denying the forum non conveniens motions of the Defendants. Attached as Appendix 1. Same can be found at 597 F.Supp. 149 (E.D. Tex. 1984).

2. The order of the district court dated April 10, 1984, denying the Defendants' request for certification of the January 30, 1984 order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). Attached as Appendix 2.

3. The notice of the district court setting the subject cases for trial on the merits and for jury selection, dated June 15, 1984. Attached as Appendix 3.

4. The order and opinion of the Court of Appeals dated July 20, 1984, directing the district court to certify the forum non conveniens order for interlocutory appeal. Attached as Appendix 4.

5. The order of the district court, dated July 30, 1984, certifying the forum non conveniens denial for interlocutory appeal as "directed" by the Court of Appeals. Attached as Appendix 5.

6. The order of the Court of Appeals dated October 2, 1984, granting Defendants' application for an interlocutory appeal and denying Plaintiffs' request for a stay. Attached as Appendix 6.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

1. Jurisdiction in this Court for the grant of stay and a writ of mandamus and/or prohibition is sought under The All Writs Act, 28 U.S.C.A. Sect. 1651(a). The authority of this Court to grant such writs expressed by both Sections 13 and 14 of the First Judiciary Act, Act of September 14, 1789, c. 20, 1 Stat. 73, 80-81, 81-82; later Sections 234 and 262 of the Judicial Code of 1911; 28 U.S.C.A. Sections 342 and 377 [both Sections 13 and 14 hav-

ing been incorporated into the All Writs Act], is sought. See LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), Opinion of Justice Brennan, pp. 263-266; and See McClelland v. Carland, 217 U.S. 268 (1910); In Re National Labor Relations Board, 304 U.S. 486 (1938); In Re Merchants' Stock and Grain Co., 223 U.S. 639 (1912); Matter of Christiansen, 194 U.S. 458 (1904).

2. Jurisdiction is also sought under 28 U.S.C.A. Sect. 1254(1), the permissive certiorari statute. This Court has repeatedly utilized its permissive certiorari power to review the grant of mandamuses or similar action by the Courts of Appeals. Allied Chemical Corporation, supra; Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978); Platt v. Minnesota Mining & Manufacturing, 376 U.S. 240 (1964); Roche v. Evaporated Milk Association, 319 U.S. 21 (1943); and Bankers Life and Casualty Co. v. Holland, 346 U.S. 379 (1953).

3. Jurisdiction of the Supreme Court

is also sought under the All Writs Act within the purview of that doctrine frequently referred to as "common law certiorari", which permits review to be sought "in cases that are not otherwise subject to present review." In Re Chatwood, 165 U.S. 443 (1897); Maxwell v. Bishop, 385 U.S. 650 (1967); Far East Conference v. U.S., 342 U.S. 570 (1952); De Beers Consolidated Mines, Ltd. v. U.S., 325 U.S. 212 (1945); United States Alkali Export Association v. U.S., 325 U.S. 196 (1945); House v. Mayo, 324 U.S. 42 (1945); and In Re 620 Church Street Building, 299 U.S. 24 (1936). Since the ruling of the Court of Appeals complained of in this case involves a semantical avoidance of a specific mandamus grant,[1] we are uncertain whether a permissive certiorari is appropriate and, therefore, it may be necessary for the

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[1] See discussion of Court of Appeals' order of July 20, 1984, infra, under Statement of the Case.

Court to resort to the All Writs Act, either to issue a Writ of Prohibition and/or Mandamus or to entertain a common law certiorari. Whatever the form of jurisdiction, it is clear that this Court needs to act to prevent the Court of Appeals from doing indirectly what it most certainly, as it seems to recognize itself, cannot do directly.

TREATIES, UNITED STATES STATUTES AND RULES AND TEXAS STATUTES WHICH THIS CASE INVOLVES

This case involves directly and indirectly the construction and application of the following treaty provisions, United States Statutes and Rules and Texas Statutes: The All Writs Act, 28 U.S.C.A. Sect. 1651 (a); 28 U.S.C. 1292(b); 46 U.S.C. 688, known as the Jones Act; 28 U.S.C. 1350; Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693; Article 4678 of the Revised Civil Statutes of the State of Texas; and Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE AND FACTS UPON WHICH ALL RELIEF IS SOUGHT

These suits were brought by three separate seamen, Picco, Crowe and Munusamy, who were injured in three separate accidents. All three were citizens of foreign countries at the time of the accidents[2] but the common threads that run through all three cases are: they were the actual or beneficial Jones Act employees of three companies that had their home offices and bases of operation in "Houston, Texas";[3] said three Houston-based companies operated worldwide and directly or beneficially

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2 Picco - Canada; Crowe - New Zealand; and Munusamy - Malaysia. One, however, Munusamy, became a resident of the U.S. after the accident and received extensive medical treatment in Houston, Texas.

3 Picco - Global Marine Drilling, Inc. ("Global"); Crowe - Oceaneering International, Inc. ("Oceaneering"); and Munusamy - McClelland Engineering, Inc. ("McClelland").

owned and/or operated the three vessels in question;[4] all these vessels were more like the traditional vessel, moving constantly in various seas, rather than a jack-up or semi-submersible rig which remains at fixed locations for long periods of time, and all three vessels were directly or beneficially flagged in the United States[5]; all three seamen were "traditional seamen", employed to work in any sea and upon any vessel as might be required by their Jones Act employers - they

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[4] Picco - Glomar Atlantic, a drill-ship; Crowe - the diving portion of the Pacific Protector, a diving vessel; and Munusamy-Hole Master 1500, a drill barge used to drill for core samples on the bottom of the sea.

[5] The Glomar Atlantic was American flagged and owned; the diving portion of the Pacific Protector was owned and beneficially "flagged" in the U.S.; and the Hole Master 1500 carried a Panamanian corporate owner and flag indisputably "of convenience." See discussion of how the diving portion of a vessel is normally owned, operated and controlled by the diving company and thus is considered separate and apart from the overall vessel for choice-of-law purposes. Sharber v. Ocean Systems, Inc., Cause No. S-75-67-

bore no resemblance to the "indigent off-shore workers" described in Phillips v. Amoco Trinidad, 632 F.2d 82 (9th Cir. 1980), cert. den. 451 U.S. 290 (1981), the progenitor of the so called "rig-cases";[6] while the places of injury were in foreign or international waters, the seamen alleged

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(U.S.D.C., E.D. Tex., 1980); excerpts attached as Appendix 8.

[6] In Phillips, the decedents were citizens of Trinidad, who by their labor union contract with their employer, were confined to a jack-up rig at a fixed location in the territorial waters of Trinidad, and under their contracts and the law of Trinidad were required to make any claims for injury under the law of Trinidad. The Ninth Circuit held under such circumstances that because the place of injury of these workers was not fortuitous, of the choice-of-law factors established by the Court in Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero, supra; and Rhoditis, supra, more weight would be given the nationality of the seamen and place of injury, and held that the law of Trinidad applied. The Fifth Circuit seized upon the Phillips decision and systematically and extravagantly expanded upon its tenets to the point that it has "legislatively" emasculated the Jones Act insofar as foreign seamen are concerned. See Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981), cert. den., 102 S.Ct. 1714 (1982); Vaz Borralho v. Keydril,

in each case that their Houston-based Jones Act employer was guilty of negligent acts which occurred in Houston and the United States and that those acts were a contributing cause of the injuries at sea (such as negligent preparation of diving proce-

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696 F.2d 379 (5th Cir.) reh. den. 710 F.2d 107 (5th Cir. 1983). Zekic v. Reading and Bates Drilling Co., 680 Fed. 1107 (5th Cir. 1982) aff'd. 536 F.Supp. 23; De Oliveira v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983); and Bailey v. Dolphin International, Inc., 697 F.2d 1268 (5th Cir. 1983). But see Fisher v. Agios Nicholaos V, 658 F.2d 308 (5th Cir. 1980), reh. den., 636 Fed 1107, cert den. 102 U.S. 92; and Castanho v. Jackson Marine, Inc., 650 F.2d 546 (5th Cir. 1981), reh. den. 656 F.2d 700. The manner in which these decisions conflict with extant Supreme Court law, namely Lauritzen, Romero and Rhoditis, should, we respectfully submit, be dealt with by this Court at perhaps another place and at another time. Congress has already demonstrated that it felt the matters espoused by the Fifth Circuit in its "rig case" decisions were in the constitutional domain of Congress when it amended the Jones Act on December 29, 1982 to exempt from the Jones Act all foreign personnel on offshore rigs. See H.R. 3942, 97th Congress, Second Session, December 29, 1982. But, see

dures, diving tables, drilling and other operating and maritime procedures; negligent selection and design of equipment; and negligently selecting and training supervisors and size and make-up of the crew); and, lastly, as to the location of the witnesses, most of them in each case are in the United States, some are spread in other parts of the world and few, if any, remain in the nations off whose shores

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Borralho rehearing, 710 F.2d 207. However, Congress expressly included a "savings clause" in the Amendment, and these accidents all occurred prior to that Amendment. In any event, in these cases, as stated above, these seamen were employed to work any place in the world that their international, worldwide maritime employer might direct. Munusamy, as a citizen of Malaysia, was injured in waters off Dubai; Crowe, as a citizen of New Zealand, was injured in waters off Brunei; and, while Picco was a Canadian injured in waters off Canada, the Glomar Atlantic was preparing to sail for the Pacific and most of the Canadian crew (who incidentally had joined the vessel at an American port) went with the vessel to the Pacific. Picco, Crowe and Munusamy had no contracts confining their place of work to a particular nation's territorial waters or their claims for injury to a particular nation's laws.

these accidents occurred.[7]

The suits were filed under the Jones Act, 46 U.S.C. 688, and the general maritime law of the United States.[8] In addition, the seamen sued alternatively under diversity, invoking state law and/or foreign law pursuant to the terms and provisions of Article 4678, R.C.S. of Texas.[9]

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[7] The Plaintiffs stipulated that they would use only Texas experts, readily available for depositions in Texas, and would pay the costs of Defendants' counsel to travel for any depositions Defendants might want to take in foreign nations on the merits of the case. This Court approved the post-accident stipulations of the Defendants in Piper v. Reyno, 454 U.S. 235 (1981) as a legitimate, influencing factor in forum non conveniens determinations, and we assume that what is good for the goose is good for the gander. Moreover, nearly all the supervisory personnel in these three cases were Americans, available in the United States for depositions.

[8] The injuries sustained by these seamen were extremely serious but not fatal: Picco - permanent brain injury; Crowe - permanent "bend" (neurological) injury; and Munusamy - loss of a leg and other injuries.

[9] Article 4678 provides that foreigners may sue for foreign transient torts in the Texas courts (provided there is in

The Defendants filed motions to dismiss on grounds of forum non conveniens. After considerable discovery, extensive briefs and a full-scale hearing, the district court, in what even the Court of Appeals conceded to be an exhaustive opinion, Appendix 4, p. 1, denied the forum non conveniens motion. 597 F.Supp. 149, Appendix 1. In that opinion, the district court cited and thoroughly discussed all of the

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personam jurisdiction over the Defendants). While the court may apply Texas or some other law, the court must adjudicate the case. Allen v. Bass, 4 S.W.2d 426 (Tex.Ct.App. 1932) err. ref. (any outright refusal of writ of error after 1928, as in Allen v. Bass, means that the Supreme Court of Texas approves not only the result, but also the opinion of the Court of Appeals). But see Couch v. Chevron, 677 S.W.2d 16 (Ct.of App. Tx. 1984), writ of error pending S.Ct. The theory of Plaintiffs is that even if the court held that the Jones Act and general maritime law did not apply to these cases, and dismissed the foreign subsidiaries, diversity would thereby exist and jurisdiction would remain in the district court to adjudicate, pursuant to Article 4678, the seamen's claims against the Houston-based Defendants under Texas or foreign law. See Romero v. International Terminal Operating Co.

factors prescribed by this Court on the choice-of-law question in Lauritzen, Romero and Rhoditis, pp. 152-157, and all of the criteria relevant to a forum non conveniens determination, as established by this Court in Gulf Oil Company v. Gilbert, 330 U.S. 501 (1946) and Piper v. Reyno. See 597 F.Supp. pp. 158, 159 concerning the "Private Interests" factors and pp. 159-160 concerning the "Public Interests" factors.

The district court, properly following the mandate of this Court in Romero that the choice-of-law determination be treated as one under Rule 56, F.R.C.P.,[10] held:

> Finally, the court perceives the facts crucial to the choice-of-law determinations to be inseparably woven with the merits of the causes. The apparent extent of effective U.S. ownership and control of: the

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10 358 U.S. at pp. 357, 358, wherein this Court stated that the choice-of-law claim is in effect a determination of "whether a claim was stated upon which relief can be granted", and thus the court

> vessels, the victims' employers, and the other entities involved is such as to require deferring the choice-of-law until the evidence has been presented on the merits."

579 F.Supp. at 1157.

As to the forum non conveniens question, the district court, having deferred the choice-of-law determination, did not want, as it stated, to prejudice the Defendants by delaying that decision and went on to exercise its discretion and decide the question. In so doing, the district court gave the Defendants the benefit of the doubt by considering whether it

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> must "treat the motion as one for summary judgment under Rule 56." In De Alvarez Chirinos v. Creole Petroleum Corp., 613 F.2d 1240 (3rd Cir. 1980), the court stated: "The District Court stated that therefore the controlling question is whether the Jones Act and the United States general maritime law are applicable. Thus, the District Court's decision was principally concerned with whether the Plaintiffs were entitled to relief under United States law, and as such, it was in the nature of a decision on a motion for summary judgment. Therefore all factual disputes and inferences are to be resolved favorably for the plaintiffs. Adickes v. S. H. Kress and Co., 398 U.S. 144,

would still deny the Defendants' motion even if foreign law applied. 579 F.Supp. at p. 159.

Lastly, while the district court did hold, and clearly correctly so, that the SLSIS Treaty requires the courts to treat all foreign seamen employed by American Jones Act employers or serving on vessels owned or operated by American companies the same as American seamen on said vessels for choice-of-law or forum non con-

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pp. 158-159 (1970); Wright Law of Federal Courts (1970)." Chirinos, at 1343-1344. Emphasis added. But see rationalization of the Fifth Circuit in Borralho where, strangely without mentioning Romero or Chirinos, it held that unless there is "meshing" of the fact issues relevant to choice-of-law with fact issues relevant to the merits, the district court may decide such fact issues at the pre-trial stage. 696 F.2d at p.387,388. Even if Borralho's "meshing" requirements be imposed, the district court in this case correctly declined to resolve disputed issues at the pre-trial stage. See also McBeath v. Inter-American Citizens for Decency Committed, 374 F.2d 359 (5th Cir. 1967), cert. den. 389 U.S. 8896 (1968).

veniens purposes,[11] and while such decision is probably a decision of first impression[12], as we shall see, infra, this fact does not make the matter a controlling question of law and particularly is this true here since the district court made it clear that, while the effect of the SLSIS Treaty was one factor it considered, it assiduously considered all the factors suggested by this Court with respect to choice-of-law and forum non con-

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[11] That this is the intent of the Treaty is made perfectly clear in Article 11: "This Convention and national laws and regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race."(emphasis ours).

[12] A number of cases of this Court have recognized the validity and import of the SLSIS Treaty, but never quite reached the precise question decided by the district court. DeZon v. American President Lines, 318 U.S. 660 (1943); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); and Warren v. United States, 340 U.S. 523 (1951). The effect of the SLSIS Treaty was not before any of the courts in the rig cases.

veniens determinations and based its decision as much, if not more, on those considerations than on the effects of the SLSIS Treaty. 597 F. Supp. at 157-160.[13]

The defendants timely sought certification by the district court of the forum non conveniens denial for an interlocutory appeal pursuant to 28 U.S.C.A. 1292(b). This was denied on April 10, 1984. Appendix 2.

Thereafter, the defendants did nothing for several weeks, even though discovery was ongoing and the cases were rapidly moving toward trials on the merits. It was only after the district court, on June 15,

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[13] The district court's expressed inclination to apply American law seems to be based as much on factors which this Court emphasized in Lauritzen, Romero and Rhoditis as it is on the SLSIS Treaty. 597 F.Supp. at pp. 152-156. Actually the SLSIS Treaty only involves one of the factors specifically listed in Lauritzen and Rhoditis (nationality of seaman) and Rhoditis stated that there may well be other factors. The district court's opinion certainly does preclude the possibility that it relied, at least to some extent, on factors other than those listed in Lauritzen and Rhoditis.

1984 (Appendix 3), notified the parties that the cases were set for jury selection and trial on the merits that the Defendants, on June 25, 1984, filed their petition for writ of mandamus with the Court of Appeals, requesting the Court to intervene and mandamus the district court to grant the forum non conveniens motion or, in the alternative, to certify the forum non conveniens order for interlocutory appeal.

Without the record of the court below before it, and only 25 days after the petition for mandamus was filed, the Court of Appeals, obviously recognizing the absence of authority to expressly "mandamus", the district court employed what we will refer to as a "de facto mandamus": it held that the district court's "refusal to certify" constituted an "abuse of discretion"; unequivocally "vacated that (the order denying interlocutory appeal) order"; and denied the mandamus "without prejudice" while at the same time "request(ing)

that the district court certify its interlocutory order for appeal." Appendix 4, pp. 5963 and 5966. The Court of Appeals conceded that the opinion of the district court "state(d) few facts" and admitted that it was deciding to "intervene" in what even it conceded was a "rare step", even though it was relying solely on "the opinion (of the district court) and . . . the petition for mandamus." Id. at p. 5963. The basis for its "rare" decision to intervene was stated as follows:

> Although the court's opinion rests on novel premises, declines to determine what substantive law is to be applied at trial, and appears to question both the continuing validity of controlling precedent of this Court and that of the Supreme Court, the trial judge refused to certify his interlocutory order for appeal.

Id. at p. 5963. In order to leave no doubt that it really meant to "command" the district court to certify, the Court of Appeals added:

> Since we do not doubt that the court will promptly proceed to certify in view of this conclusion and will

> abide our decision before proceeding to trial, we decline to issue a preemptory order at this time. (Emphasis added.)

Unquestionably the Court of Appeals had thus, by the use of not very well disguised semantics, forced the district court to certify the forum non conveniens order for interlocutory appeal.

The district court thereafter obediently "certified" its forum non conveniens for interlocutory appeal. Appendix 5. The denial Plaintiffs immediately responded by opposing the certification and requesting the Court of Appeals to stay its proceedings so that the district court could make "Findings of Fact and Conclusions of Law," and thus perhaps clarify the choice-of-law questions about which the Court of Appeals so bitterly complained. However, the Court of Appeals, on October 2, 1984, summarily granted the interlocutory appeal and denied Plaintiffs' request for a stay. Appendix 6. All parties have been notified

to brief the merits of the interlocutory appeal.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

1. The jurisdiction in the district court was invoked under the Jones Act, 46 U.S.C. 688, and the general maritime law of the United States.

2. Jurisdiction in the district court also was invoked on the basis of diversity of citizenship, 28 U.S.C. 1332, seeking the application of the law of Texas and/or foreign law as provided for in Article 4678, Revised Civil Statutes of Texas.

REASONS FOR ISSUING A STAY, WRIT OF MANDAMUS OR PROHIBITION, GRANTING A COMMON LAW CERTIORARI, AND/OR GRANTING A PERMISSIVE CERTIORARI

1. Unusual Relief In The Form Of Stay, Mandamus, Prohibition Or Common Law Certiorari Clearly Justified.

What this case is all about is the arrogant display of judicial power on the part of the Court of Appeals.[14]

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[14] The writing judge has manifested a pattern which reveals, we submit, less than

Surely realizing that an express mandamus of a district court judge to exercise his discretion, against his will, to certify an interlocutory appeal would be contrary to the clear intent of Congress, the Court of Appeals made a transparent attempt to avoid this pitfall with semantics. The bottom line is that Judge Fisher was told that his order denying certification was "vacated" and that if he did not certify, he would be mandamused, and the Court of Appeals took this extraordinary action without having the record of the district court before it and even though it conceded that the district court's opinion

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the kind of support for jury trials and the fact findings of juries or trial judges than we believe this Court has repeatedly suggested. See Poller v. Columbia Broadcasting System, 368 U.S. 464, 1962 (jury trials are the "hallmark" of our system of justice). As an example of such decisions see Nicol v. Gulf Fleet Supply Vessels, No. 83-3264, 5th Cir., Oct. 1984; Hemingway V. Oschner, 722 F.2d 1220 (5th Cir. 1984); Soza v. M/V Lago Izabel, 736 F.2d 1028 (5th Cir. 1984); Hines v. Tenneco Chemi-

stated "few facts."

And what so prejudicially compounds the grant of mandamus here is that even if the Court of Appeals had the power to mandamus a district judge into certifying an interlocutory appeal, this particular case is clearly not a proper case for an interlocutory appeal for all the reasons we discuss in detail, infra.

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cals, Inc., 728 F.2d 792 (5th Cir. 1984); Nilsen v. City of Ross Point, Miss., 704 F.2d 556 (5th Cir. 1983); Brooks v. United States, 695 F.2d 1984 (5th Cir. 1983); Dhymes v. Branick Mfg. Co., 629 F.2d 409 (5th Cir. 1980); De Almanza v. Laredo Water Works Systems, 582 F.2d 970 (5th Cir. 1978); Cleckner v. Republic Van and Storage Co., 556 F.2d 766 (5th Cir. 1977); Owens v. International Paper Co., 528 F.2d 606 (5th Cir. 1976); Williams v. Mumford, 683 F.2d 938 (5th Cir. 1982); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982); Sessions v. La. Light & Power Co., 652 F.2d 579 (5th Cir. 1981; Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980); Conway v. Chemical Leaman Tank Lines, 540 F.2d 837 (5th Cir. 1976) and

These petitioners, the Plaintiffs, have suffered serious injuries which leave them maimed for life. They look to this Court, the highest Court in our land, as a tribunal that will consider their plight, a plight created by the heavy handed intervention of the Court of Appeals. With the continuing hardships and suffering such serious injuries bring, it is surely true that "justice delayed

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United States v. Gregory-Postland Independent School District, 654 F.2d 989 (5th Cir. 1981). This case is not the first case in which this Judge has intervened to use the court's extra-ordinary process. See In Re Greyhound Lines, Inc., 598 F.2d 883 (5th Cir. 1979) (mandamused district court not to remand a case to state court). On the other hand, the decision in this case becomes even more perplexing in the light of this Judge's opinion in In Re McDonnell Douglas, 647 F.2d 515 (5th Cir. 1981) (denying mandamus in 1404a transfer case because the decision of the lower court was "discretionary"; see discussion in this brief, infra).

is often justice denied."[15] These petitioners were given by the district court the right to go to trial on the merits on August 26, 1984 and the Court of Appeals had no cause in law or equity to intervene just before that trial and deprive them of that right.[16] For some reason, the legal basis for which is yet unapparent to us, the Court of Appeals chose to vigorously trample upon the "final judgment rule" and the policy repeatedly expressed

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15 For one thing, the Plaintiffs, being injured and not killed, cannot receive prejudgment interest. See Sanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958 (5th Cir. 1969); Doucet v. Wheless Drilling Co., 467 F.2d 336 (5th Cir. 1972)); and Pluyer v. Mitsui O.S.K. Lines Ltd., 664 F.2d 1243 (5th Cir. 1982.

16 One possible explanation of the panel's precipitate action in intervening just before jury trial was to begin, is that in Castanho v. Jackson Marine, after

by Congress and this Court that "piecemeal appeals" are to be avoided.

We respectfully submit that the Plaintiffs in this case are entitled to the extraordinary relief they seek.

2. The Court of Appeals' De Facto Mandamus Was Improper Because, In Violation Of This Court's Mandate In Allied Chemical Corporation v. Daiflon, Inc., The Court, Without Having Any Transcript Or Record Of The District Court Proceedings Before It, Hastily Granted Such Ex-

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the Court of Appeals had properly denied a similar request for mandamus of the district judge's denial of a Defenants forum non conveniens motion, 650 F.2d 546, the case went to trial before a jury and, after a week of trial, was settled for an amount somewhere between American and foreign standards of justice, but certainly more than what the Defendants had hoped to relegate that quadraplegic Plaintiff to under foriegn law. The district court in this case wisely recognized the Defendants' frantic efforts to avoid trials by jury in our courts for what they truly are: they seek foreign forums not because they are really inconvenienced but because they want to reduce their client's economic exposure. 597 F.Supp. at p. 158 ("Like the Plaintiffs, the Defendants simply seek dismissal to a forum where the law is more advantageous to them").

traordinary Relief And, In so Doing, By Its Own Statement Relied Solely Upon The Opinion Of The District Court And The Defendants' Petition For Mandamus.

In Allied Chemical Corporation v. Daiflon, Inc., this Court reversed a court of appeals' grant of mandamus directing the district court to vacate its order granting a new trial. In so doing, this Court stated:

> Given that the Court of Appeals did not have a complete transcript of the proceedings before it, see n 1, supra, and that there could be other unarticulated bases for the new trial order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the new trial order.

449 U.S. at pp. 36, 37, nte. 3. While we recognize that the foregoing proposition cannot be automatically employed to every mandamus grant, it surely is applicable to this case.

The Court of Appeals here, after complaining that the district court's "opinion states few facts," unabashedly admitted

that it was taking the drastic action it took based solely on that opinion and the Defendants' petition for mandamus. We severely criticized, and took strong objection to, the Defendants' statement of facts in their petition for mandamus. See "Response of Respondents to Petition for Writ of Mandamus To The United States District Court For The Eastern District of Texas To The Honorable Joe J. Fisher, Judge of Said Court." The relevant portions of that response are attached as Appendix 8. Also, it goes without saying that in this case, since the district court did not file findings of facts and conclusions of law (indeed, the Court of Appeals, in its "rush to judgment", would not stay the proceedings so that the district court could, pursuant to Plaintiffs' request, file such findings of fact and conclusions of law), the district court could have very well relied upon, in denying the forum non conveniens motion, facts and considerations

not stated in the opinion. Therefore, in this case "it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the . . . (forum non conveniens denial) order."

3. A Court of Appeals' Mandamus, De Facto Or Otherwise, Of a District Court To Grant An Interlocutory Appeal Under 28 U.S.C.1292(b) Is Always Improper Because Congress Made It Clear That Such Appeals Will Only Be Permitted If The District Court Freely Exercises Its Discretion That An Interlocutory Appeal Should Be Certified.

28 U.S.C. 1292(b) provides in part as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. (Emphasis added.)

The legislative history of 1292 (b) clearly

establishes that the nature of the district court's part in the interlocutory appeal process it totally discretionary:

> . . . [T]he appeal is discretionary rather than a matter of right. It is discretionary in the first instance with the district judge . . . ."

S.Rep. 2434, 85th Cong., 2d Sess., 1958, in 1958 U.S. Code Cong. & Admin. News 5255, 5257.[17] Professor Wright gives a more detailed view of the history and practices relating to the district court's discretion under 28 U.S.C. 1292(b):

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17 The Judicial Conference Committee on Appeals from Interlocutory Orders emphasized the purpose of requiring the district judge's discretionary certification before such an appeal would be proper:

> The right of appeal . . . is limited . . . by the requirement of the certificate of the trial judge, who is familar with the litigation and will not be disposed to countenance dilatory tactics. . . ."

Report of the Judicial Conference Committee on Appeals from Interlocutory Orders, 1953, 1958 U.S. Code Cong. & Admin. News 5260, 5261

> Participation of the district court in certifying permissive interlocutory appeals was not included in the original proposal studied by the Judicial Conference. The original proposal would have allowed the court of appeals to authorize an appeal in its discretion, if determined to be "necessary or desirable to avoid substantial injustice." This proposal was rejected for fear that it "would unduly encourage fragmentary and frivolous appeals." The requirement that the district judge certify the order was deliberatly suggested, and deliberately adopted to secure an initial judgment on the desirability of appeal by the trial judge as the person most immediately familar with the litigation. Many cases have ruled that no appeal is available unless the district judge enters the certificate, and they are right both in terms of the clear language of the statute and the clear purpose of its history. Likewise, efforts to persuade a court of appeals to issue mandamus to compel certification by the district judge have uniformly proved unsuccessful. (Emphasis ours.)

Wright and Miller, Federal Practice and Procedure, §3929, pp. 138-139. The cases cited by Professor Wright are legion and compelling in their incisiveness and decisiveness: Arthur Young & Co. v. U.S. District Court, 549 F.2d

686, 698 (9th Cir. 1977); Green v. Occidental Petrol Corp., 541 F.2d 1335, 1338 (9th Cir. 1976) (per curiam) ("[W]e are without power to assume unilaterally an appeal under section 1292(b) . . . Nor is mandamus to direct the district judge to exercise his discretion to certify the question an appropriate remedy"); In Re Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213, 2161-217 (8th Cir. 1975); In Re Maritime Service Corp., 515 F.2d 91, 92 (1st Cir. 1975); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 755-756 (3rd Cir. 1973) ("[T]he use of mandamus as a means of forcing the district court to make a certification under . . . 1292(b) does not seem appropriate . . . "); Learning Data Processing Corp. v. Maxwell, 468 F.2d 1326, 1344 (2nd Cir. 1972) ("Congress plainly intended that an appeal under Section 1292(b) should lie only when the district court and the court of Appeals agreed on its propriety. It would wholly frustrate

this scheme if the Court of Appeals could coerce decision by the district judge", (emphasis added); U.S. v. 687.30 Acres, 451 F.2d 667, 670 (8th Cir. 1971), cert. den. 405 U.S. 1026 ("We have no jurisdiction to review the trial court's denial of the section 1292(b) certificate"); Firestone Tire & Rubber Co. v. General Tire & Rubber Co., 431 F.2d 1199 (6th Cir. 1970), cert. den., 401 U.S. 975); D'Ippolito v. Cities Services, 374 F.2d 643 (2nd Cir. 1967); Ex Parte Tokio Marine & Fire Insurance Co., 322 F.2d 113, 115 (5th Cir. 1963); Hirsh v. Brickhausen, 284 F.2d 783, 786 (2nd Cir. 1960)("Certainly we have no right or desire to control the trial judge's exercise of discretion in denying leave for an interlocutory appeal"); In Re Master Key Antitrust Litigation, 528 F.2d 5(2nd Cir. 1975); and State Board of Aviation v. Fox, 620 F.2d 578 (6th Cir. 1980).

The only case, other than this one,

that we could find to the contrary is Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982), in which the Court of Appeals stated that "this case presents the truly 'rare' situation in which it is appropriate for this court to require certification of a controlling issue of national significance."[18]

Thus, in summary, it is our position that the Court of Appeals in this case did not have the "power", "authority", "jurisdiction", or legal right to issue its de facto mandamus "forcing" the district court to certify an interlocutory appeal, and its act in so doing was such

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18 In two cases, Varo v. Comprehensive Designers, Inc., 504 F.2d 1103 (9th Cir. 1974) and Ernst & Ernst v. United States District Court, 439 F.2d 1288, 1293-94 (5th Cir. 1971), the Court of Appeals requested the district court to reconsider the advisability of certifying an interlocutory appeal but a reading of those two cases indicates that the Court of Appeals did not hold "the hammer over the head" of the district court as the Court of Appeals did in this case.

a clear abuse of its power and/or discretion as to justify the extraodinary relief we seek. Most certainly it was such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." At the least, the action of the Court of Appeals in this cases constitutes "an important question of federal law which has not been settled by this Court." We have found no decision of this Court which specifically resolves this issue and with the clear conflict between the courts of appeals -- the Ninth, Eighth, Second, Sixth, First and Third on the one hand, expressly holding that mandamusing the district court to certify an interlocutory appeal is beyond the power and authority of the courts of appeals, and the Fifth and Eleventh on the other hand, holding directly to the contrary -- this Court, we respectfully submit, should surely at the least grant a permissive cer-

tiorari in order to resolve this most important federal question and achieve uniformity in the circuit courts.

4. Even If This Court Were To Hold That, In A Proper Case, The Court of Appeals Has The Power To Mandamus A District Court To Certify An Interlocutory Appeal, This Is Not A Proper Case For Such A Mandamus Because This Is Clearly Not An Appropriate Case For Certification.

Passing on, alternatively, to the question of whether this is, in any event, a proper case for mandamusing the certification for interlocutory appeal or for even certifying an interlocutory appeal, we submit for the reasons hereinafter stated, that it is so clear that this is not a proper case for a mandamus, or for the acceptance by the Court of Appeals of the interlocutory appeal, that this Court should grant the extraordinary relief requested or, at the least, grant permissive certiorari. Moreover, as will be seen, the ruling of the Court of Appeals on the propriety of an interlocutory appeal in this case conflicts with the

decisions of other courts of appeals and with the decisions of this Court.

A. The Ruling By The District Court On The Forum Non Conveniens Question Is A Discretionary Act Which, Unless The District Court Fails To Consider The Appropriate Factors, Cannot Be The Subject Of A Mandamus Or An Interlocutory Appeal.

(1) Mandamus. This Court has consistently held that a mandamus should not be utilized with respect to discretionary decisions. In one of its more recent decisions on the matter, Allied Chemical Corp. v. Daiflon, Inc., the Court observed (we quote at length because this Court, in a per curiam opinion, articulated what must be said at this point better than we ever could):

> It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. Will v. United States, 389 US 90, 95, 19 L Ed 2d 305, 88 S Ct. 269 (1967); Bankers Life & Cas. Co. v. Holland, 346 US 379, 382-385, 98 L Ed 106, 74 S Ct 145 (1953); Ex parte Fahey, 332 US 258, 259, 91 L Ed 2041, 67 S Ct 1558 (1947).
>
> Although a simple showing of error may suffice to obtain a reversal on

direct appeal, to issue a writ of mandamus under such circumstances would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." Will v. United States, Supra, at 98, n 6, L Ed 2d 305, 88 S Ct 269.

. . .

Only exceptional circumstances, amounting to a judicial usurpation power, will justify the invocation of this extraordinary remedy. Will v United States, supra, at 95. The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. See Kerr v. United States District Court, 426 US 394, 402-403, 48 L Ed 2d 725, 96 S Ct 21191 (1976). Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." Id, at 403. In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, ibid. Roche v. Evaporated Milk Assn., supra, at 26, 87 L Ed 1185, 63 S Ct 938, and that he satisfy the "burden of showing that [his] right to issu-

ance of the writ is 'clear and indisputable." Bankers Life & Cas. Co. v. Holland, supra, at 384, 98 L Ed 106, 74 S Ct 145, quoting United States

v Duell, 172 US 576, 582, 43 L Ed 559, 19 S Ct 286 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, hardly ever!"

. . .

A litigant is free to seek review of the propriety of such an order (new trial) on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires." The authority to grant a new trial, moreover, is confined almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." Will v Calvert Fire Ins. Co. 437 US 655, 666, 57 L Ed 2d 504, 98 S Ct 2552 (1978) (lurality opinion).

To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemean appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would

leave that policy at the mercy of any court of appeals which chose to disregard it.

449 U.S. at pp. 34-36; emphasis ours.[19]

(2) Interlocutory Appeals Under §1292(b).

The principles governing the district court's discretion with respect to interlocutory appeals is much the same as those governing mandamuses generally. In researching the cases, we found a most descriptive observation about the attitude a court should take in considering whether to certify for interlocutory appeal a matter involving its own discretion:

> "[T]he likelihood of successfully urging an abuse of discretion in the appellate court (on interlocutory appeal) is comparable to the chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water." Seven-Up Co. v. O-So Grape Co., 179 F.Supp. 167, 172 (D.C. Ill. 1959).

Professor Wright states:

> Ordinarily, a district court should refuse to certify (under 1292 b) such

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19 The Court in Coastal Steel v. Tilghman Wheelbrator, Ltd., 709 F.2d 190 (3rd Cir. 1983) places a forum non conven-

> matters (discretionary matters) not only because of the low probability of reversal, but also because the recognition of discretion results from a studied determination (with which) appellate courts should not generally interfere."

Wright & Miller, id. at Section 3930, p. 161.[20]

(3) 28 U.S.C. 1404(a) Transfer and Forum Non Conveniens Motions.

As to transfer and forum non conveniens motions generally, Wright & Miller observes:

> There have been persistent attempts to obtain review of these interlocutory orders regarding transfer either under 28 U.S.C.A. §1292(b), which

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iens determination squarely within the same context, insofar as the above language of this Court is concerned, as a motion for new trial. The Coastal Steel court noted that this Court had expressly held in Gulf Oil v. Gilbert that the forum non conveniens decision is discretionary with the district court and, after listing the factors to be considered, stated:

> These are considerations going to the merits of the case and requiring assessment of the substantive issues in the litigation. Moreover, even when a trial court misjudges a forum non conveniens claim, a reviewing court can after final judgment, ascertain the degree of prejudice and reverse.

20 The Court in Ohio Environmental Council

> gives the appellate courts discretion to hear interlocutory appeals on certification from the district court, or by the extraordinary writs of mandamus and prohibition. The propriety of some form of interlocutory review seems quite clear if the issue goes to the power of the district court to make the order it did and only a question of law is presented. But a very compelling argument can be made that if there is no question of power, and the only issue is whether the district judge exercised his discretion properly in considering the factors mentioned in the statute and granting or or refusing the transfer, interlocutory review ought not be avialable. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges.

709 F.2d at 195; emphasis ours.

Wright & Miller, Id. Review of Transfer Rulings, Sect. 3855, p. 302, 303. (Emphasis added.)

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v. United States District Court, 565 F. 2d 393 (6th Cir. 1977) is even more emphatic, stating that where the Court of Appeals is acting on an abuse of discretion "there is no question of law" that can be certified for an interlocutory appeal.

As to mandamuses, the Fifth Circuit, to Castanho v. Jackson Marine, Inc., correctly noteed that the "discretion" involved in forum non conveniens determinations shuld be treated the same, in mandamus cases, as the "discretion" involved in 28 U.S.C. 1404(a) transfers. 650 F.2d at 550. After so observing, the Court stated:

> Our decisions make it clear that mandamus is an extremely limited means of challenging the district court's discretion in this area; as Pfizer indicates, a party seeking such a writ must demonstrate a failure on the part of the district court correctly to construe and apply the relevant factors, or must show some clear abuse of discretion in the court's decision on the forum non conveniens issue . . . This standard has been strictly applied. As some commentators have noted, "the Fifth Circuit . . . never has found in a decision on a motion to transfer under Section 1404(a)an abuse of discretion sufficiently clear to justify mandamus." 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3855, at 314 (1976).

650 F.2d at 550, emphasis added .

The Supreme Court has been just as negative about the possibility of mandamus in transfer cases. Bankers Life & Casualty Co., v. Holland, 356 U.S. 379 (1953); Platt v. Minnesota Mining & Manufacturing Co., supra, and see comments of the Court in LaBuy v. Hower Leather Co., 352 U.S. 249 (1957). In Platt the Court, in reversing a Court of Appeals' mandamus of a district court's denial of a transfer of venue motion, stated:

> Here, however, the Court of Appeals undertook a de novo examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used "to actually control the decision of the trial court." Bankers Life & Casualty Co. v Holland, 346 US 379, 383, 98 L Ed. 106, 111, 74 S Ct 145 (1953).

376 U.S. at p. 245; Emphasis added. [21]

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21 What is disconcerting is that the writing judge in this case, Judge Gee, seemed to conform to such mandates of the Supreme Court in In Re McDonnell-Douglas, supra, wherein he wrote the opinion, holding that it was improper in that case to mandamus the district court with respect to its discretionary ruling on a 1404(a) transfer motion.

With respect to the use of 28 U.S.C. 1292(b) in transfer/forum non conveniens cases, the Fifth Circuit, in a decision the court of appeals in this case seemed determined, for some unexplained reason, to fully ignore, states the correct and controlling principle:

> We are of the view that § 1292(b) review is inappropriate for challenges to a judge's discretion in granting or denying transfers under § 1404(a). The Congressional policy against piecemeal appeals, as expressed in the final judgment rule, 28 U.S.C. § 1291, to which § 1292(b) is a narrow exception, is eroded by permitting review ofthe exeercise of the judge's descretion under § 1404(a) as a conclusion is the same as that already reached by the Second, Third and Sixth Circuits, and by the text writers.

Garner v. Wolfinbarger, 433 F.2d 177, 120 (5th Cir. 1970). See also Tokio Marine Fire Insurance Company v. Aetna Casualty and Surety Co., 322 F.2d 133 (5th Cir. 1963); A. Olinick & Sons v. Deepwater Bros. Inc., 365 F.2d 439 (2nd Cir. 1966), 12 Vill. L. Rev. 386; Standard v. Stroll Packing Corp., 315 F.2d 626 (3rd

Cir. 1963); Bufalino v. Kennedy, 273 F.2d 71 (6th Cir. 1959); and Wright & Miller, Id., Review of Transfer Rulings, Section 3855, p. 305, stating that "most courts have thought, however, that a Section 1292(b) appeal will not lie when the question is whether the district judge property 'exercised his discretion' since this issue is hardly a 'controlling question of law' . . . ."

However, there does seem to be conflict among the circuit courts, which this Court, because of the importance of the question, should resolve. For cases permitting interlocutory appeals concerning transfer orders, see Wyndham & Associates v. Bintliff, 398 F.2d 614 (2nd Cir. 1968), cert. den. 393 U.S. 977; Lewis v. Hogwood, 300 F.2d 697, 112 U.S. App. D.C. 105;

Wilkins v. Erickson, 484 F.2d 969 (8th Cir. 1973) and Houston Fearless v. Jeter, 318 F.2d 822 (10th Cir. 1963).

B. As To The Choice-Of-Law Question, Same Was Not "Ripe" For An Interlocutory Appeal Because The District Court Did Not Decide Said Question, And The Record Was Not Fully Developed In Regard Thereto; Moreover, Since Same Involved Fact Questions And A Summary Judgment Determination, Interlocutory Appeal Clearly Was Not Appropriate.

(1.) Choice-of-Law Question No "Ripe" For Review Because It Was Not Decided.

Professor Wright Notes:

> "The basic requirement of an interlocutory appeal under Section 1292(b) is that the district court have made an order. The statutedoes not contemplate that a district judge may simply certify a question without first deciding it."

Wright & Miller, Id., Criteria for Permissive Appeal, Sect. 3930, p. 156, emphasis added, See e.g., New York Health & Hospital Corp. v. Blum, 678 F.2d 392 (2nd Cir. 1982)(the district court could not

decide the question of plaintiffs' standing to sue as a matter of law because the standing question was bound up or meshed with other issues and thus the district court deferred the "standing" question to the trial on the merits, as the district court in this case precisely did with respect to the choice-of-law question; the Second Circuit held that "Section 1292(b) was not designed to bring up the merits without prior adjudication in the trial court; the section allows an interlocutory appeal of orders -- not interlocutory appeal of issues." 678 F. 2d at 396; emphasis added).[22]

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22 See also O'Kalinsky v. Philadelphia B. & N.E.R.R., 282 F.2d 70 (3rd Cir. 1960) (interlocutory appeal order vacated, holding appellate court had "no jurisdiction" under 1292(b) because the district court had not entered an order implementing its opinion); Delta Airlines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 240 (5th Cir. 1974), cert. den. 95 S.Ct. 1953 (hold-

(2) Case Not Ripe For Review; Record Not Developed Enough.

The Court of Appeals in this case conceded that the district court's opinion contained few facts and the district court deferred the choice-of-law question to the trial on the merits, not only because of the existence of disputed fact issues, but also for a fuller development of the facts and evidence. As noted in Wright & Miller, Id., Section 3930, p. 157, the "most common ground for finding a lack of ripeness [with respect to 1292(b) appeals] is that the case has not yet developed far enough to permit considered appellate disposition of the question prescribed."[23]

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ing that on an appeal under 1292(b) by the Plaintiff from an order dismissing two counts of the complaint, the Defendant could not cross-appeal the failure to dismiss the remaining counts since the decision as to those counts, as was the choice-of-law decision in this case, had been "reserved" by the district court and thus "there is no decision . . . for us to review at this time.")

23 See also American Cyanamid Co. v. China

(3) Summary Judgment Proceedings And Existence of Disputed Fact Issues Generally Preclude Interlocutory Appeals.

As pointed out above, a choice-of-law determination is in the nature of a summary judgment proceeding. See Romero v. International Terminal Operating Company and Chirinos v. Creole Corp., supra. Denials of motions for summary judgment are generally inappropriate for 1292(b) appeals.[24]

And in any situation, including summary judgments, wherein there are relevant disputed fact issues, an interlocutory ap-

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Union Lines Ltd., 306 F.2d 135 (5th Cir. 1962); Molydenum Corp. of America v. Kasey, 279 F.2d 216 (9th Cir. 1960); Pollock & Riley, Inc., v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974), cert. den. 420 U.S. 992; Control Data Corp. v. International Business Machines Corp., 421 F.2d 323 (8th Cir. 1970) and Paschall v. Kansas City Star Co., 605 F.2d 403 (8th Cir. 1979).

24 Chappel & Co. v. Frankel, 367 F.2d 197 (2nd Cir. 1966); Afran Transp. Co. v. National Maritime Union, 177 F.Supp. 610, 611 (D.C. N.Y. 1959); Rypkema v. Bowers, 66 F.R.D. 564, 568-570 (D.C. W.Va. 1975).

peal is inappropriate.[25] The district court expressly held, and the Court of Appeals impliedly conceded, that disputed fact issues relevant to the choice-of-law determination persist in this case. A case right in point on this matter is Foster v. Maldonado, 433 F.2d 348 (3rd Cir. 1970). There the court held that rather than resolve the choice-of-law question on a 1292(b) interlocutory appeal, it would be better for the trial court to submit alternative interrogatories to the jury with respect to each set of laws. The question could then be resolved on appeal after final judgment without the necessity of a retrial. This is precisely what

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25 See Johnson v. Alldredge, 488 F.2d 820, 822 (3rd Cir. 1973), cert. den. 419 U.S. 882; Chappell & Co. v. Frankel, supra; Rippey v. Denver U.S. National Bank, 260 F.Supp. 704, 717 (D.C. Col. 1966); Seven-Up Co. v. O'So Grape Co., supra; and De Witt v. American Stock Transfer Co., 440 F.Supp. 1084, 1087-1088 (D.C. N.Y. 1977). See orders in recent case of Sherrill et al. v. Brinkerhoff, et al., Nos. 84-8016 and 84-8017 (9th Cir. 1984).

Judge Fisher planned to do. 597 F.2d at p. 157.[26]

C. Since The Diversity-State and Foreign Law Claims Still Must be Adjudicated Even If American Maritime Law Were Deemed Not To Apply, The Granting Of An Interlocutory Appeal On The Forum Non Conveniens Question Cannot Possibly Materially Advance The Litigation And Does Not Present A Controlling Question of Law.

It has always been the general view of the courts that an issue is not controlling if the case will still have to be tried in any event. Wright & Miller, Id.., Section 3930, p. 159[27]. As we have already discussed, even if the court were to hold that the Jones Act does not apply, the court could not dismiss on grounds

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26 See also Wright & Miller, Id., Section 3930, p. 165, observing that trial is better than an interlocutory appeal because the issues sought to be appealed may be mooted by the jury findings and, if not mooted, "they may be isolated by use of special interrogatories or special verdicts, so that prompt trial followed by final judgment, enjoys all of the efficiency advantages." (Emphasis added.)

27 McNulty v. Borden, Inc., 474 F.Supp. 1111, 1120-1122 (D.C. Pa. 1979); SEC v. Penn Central Co., 450 F. Supp. 908, 918 D.C. Pa. 1978).

of forum non conveniens but would still have to litigate this case under Texas state or foreign law. Romero; Article 4678, R.C.S of Texas; Allen v. Bass, supra. Thus, again, the forum non conveniens issue certainly cannot be considered "a controlling" or dispositive question of law.

D. Because This Is A Personal Injury Case Involving A Relatively Routine "Short Trial" And Because The Defendants Did Not Seek To Mandamus An Interlocutory Appeal Until Just Before Trial Was Scheduled On The Merits, An Interlocutory Appeal Under Such Circumstances Will Not "Materially Advance The Case" But Will Only Cause Unreasonable And Highly Prejudicial Delay To The Plaintiffs.

In considering whether an interlocutory appeal will materially advance the ultimate termination of the case, Section 1292(b) "was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days." Krause v. Board of County Road Commissioners, 364 F.2d 919, 922

(6th Cir. 1966). See also U.S. v. Bear Marine Services, 686 F.2d 1117, 1120 (5th Cir. 1983)(holding that since the trial on the merits was likely to be short, an interlocutory appeal would "not advance the ultimate termination of this litigation.")

In addition, the delay to be encountered during an interlocutory appeal "may be a particularly strong ground for denying appeal if certification is sought . . . shortly before a trial expected to be (relatively) brief." Wright & Miller, Id., Section 3930, p. 166.[28]

In this case, the Defendants delayed filing their Petitions for Mandamus of the

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28 See also Struthers Scientific & International Corp. v. General Foods Corp., 270 F.Supp. 122 (D.C. Tex. 1968); U.S. v. 9,947.71 Acres of Land in Clark County, 220 F.Supp. 328 (D.C. Nev. 1963); Gross v. McDonald, 354 F.Supp. 378 (D.C. Pa.1973); State Teachers Retirement Board v. Fluor Corp., 84 F.R.D. 38 (D.C. N.Y. 1979) and Lorentz v. Westinghouse Electric Corp., 472 F.Supp. 954 (D.C. Pa. 1979).

certification order until after the case had been set for trial on the merits and the Court of Appeals intervened about 30 days before these relatively "short trials" were scheduled to begin. The intervention at that point served only to unnecessarily delay the Plaintiffs' day in court and certainly did not materially advance this litigation.

E. The Question Of The Applicability And Effect Of The SLSIS Treaty Is Not A Controlling Question Of Law Because It Was Only Partially Relied Upon By The District Court With Respect To Both The Choice-Of-Law And Forum Non Conveniens Questions.

The Court of Appeals seemed to take great offense that the district court would have the audacity to consider the applicability and effect of the SLSIS Treaty. Regardless of the visceral feelings of the Court of Appeals, it is clear that the matter is not a controlling question of law.

As to the choice-of-law question, the district court carefully discussed and con-

sidered all of the eight basic elements set out by this Court in Lauritzen, Romero and Rhoditis. The SLSIS Treaty only pertained to one of those elements (the nationality of the Plaintiff) and, as the district court observed, the Supreme Court had taken the pains to point out that there may well be other elements relevant to the choice-of-law question. See Rhoditis.

This Court, in holding in Platt that interlocutory relief was inappropriate in the case under consideration, noted:

> He has represented in his answer that this "was but one of a number of factors." The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer. The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand.

376 U.S. at 244, 245; emphasis ours.[29]

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29 Moreover, a construction of a statute or treaty is usually not grounds for interlocutory appeal, U.S. Ex rel Hollander v. Clay, 420 F. Supp.

In any event, Judge Fisher's conclusions about the applicability and effects of the SLSIS Treaty, based upon the unequivocal and unabmiguous language of the Treaty, are not the kind about which there can be substantial grounds for a difference of opinion. As stated by Professor Wright:

> [T]here is little to be gained by immediate appeal if the order is probably correct, and the statute [1292(b)] has made the trial judge the initial arbiter of this question".

Wright & Miller, Id., Interlocutory Review, Section 3930, p. 158. See also, Berger v. U.S., 170 F.Supp. 795, 796-97 (D.C. N. Y. 1959).

F. This Case Does Not Justify An Interlocutory Appeal Since The District Court Properly Applied The Elements Suggested By This Court With Reference To Both The Choice-of-Law And The Forum Non Conveniens Questions.

853, 859 (D.C. D.C. 1976), and even on matters of first impression most courts are reluctant to certify for interlocutory appeal. Hunt v. Mobil Oil Co., 1976-1 Trade Cases, No. 60, 793 (D.C. N.Y. 1976) and In Re Midwest Milk Monopolization Litigation, 380 F. Supp. 880, 888 (D.C. Mo. 1974).

The district court's consideration of the appropriate factors in this case bears a striking resemblance to the comments of the Fifth Circuit concerning this very same Judge (Judge Fisher) in an extremely similar case, the Castanho case:[30]

> The defendants argue that the doctrine of forum non conveniens dictates the dismissal of this action because of a number of factors making England the most convenient forum to try this case. They contend, in brief, that relevant evidence and witnesses are more accessible in England; that pertinent events (the employment contract, the injury, and subsequent medical treatment) occurred in England; and that an American judgment may not have res judicata effect in England. These factors may indeed point in favor of English proceedings. Still, however, we cannot conclude that the district court has so misapplied the relevant factors or has so abused its discretion that a writ of mandamus may properly be issued.

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30 In fact, Castanho is the only other case we have been able to find in which the precise question of whether mandamus-interlocutory relief was appropriate with respect to a forum non conveniens order in a maritime personal injury case involving a foreign seaman.

> The district court's discussion of the forum non conveniens doctrine, 484 F.Supp. at 206-07, indicates that the court did not ignore the important considerations urged by the Defendants . Instead, the court balanced those factors against a number of other considerations which are also relevant and which point in the other direction. The court emphasized, for example, the Plaintiff's choice of an American forum; the Plaintiff's fear that an English judgment would be difficult to collect because of the Defendants' limited assets in England; the presence in Texas of the corporate headquarters of the principal Defendant; and the availability in America of certain employees of one of the Defendants. In short, "what is urged upon us is that on balance (England) is a more convenient forum than (America). That is not the basis for a writ." Garner v. Wolfinbarager, supra, at 121.

650 F.2d at 550-51; emphasis added. The district court in Castanho had already denied a request for an interlocutory appeal certification and, in so doing, had determined that the choice-of-law, forum non conveniens questions did not present issues about which there could be a substantial grounds for difference of opinion. 484 F.Supp. 201, 203, appl. dism.

in part, order aff'd in part, mand. den., 650 F.2d 546, reh. den., 656 F.2d 700.

Since one of the goals of grants of certiorari is to achieve uniformity, a good place for this Court to commence imposition of uniformity, we suggest, would be within the Fifth Circuit. When one compares the actions of the panel in Castanho to the actions of the panel in this case, a burning desire for uniformity (instead of the "luck of the draw") is immediately felt.

SUMMARY AND PRAYER

Even as early as 1975, over one hundred applications for 1292(b) appeals were made each year, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. §1292(b) 88 Harvard Law Review 607,[31] and the number has been steadily increasing. And, as noted by Professor Wright, the granting of writs in the form of "supervisory manda-

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31 See also dissenting opinion in Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860 (3rd Cir. 1977).

muses" is expanding and being increasingly used in a wide variety of situations. Wright & Miller, Id., Illustrative Writ Decisions, Section 3935, p. 242.

Little need be said about how far-reaching the impact of the actions of the Court of Appeals in this case could be. The adverse ripple effects will surely be substantial and unless immediately and firmly corrected by this Court, all cases in the federal system could be affected by a precedent whhich suggests appellate disruption of untried cases for almost any reason. Without a doubt the Court of Appeals has in this case carried the power to issue writs and entertain interlocutory appeals so far beyond their accepted use as to virtually emasculate the "final judgment rule".

Because of the importance of the questions here presented to the entire body of federal law; the fact that two of the most important issues here have not been squarely decided by this Court (whether mandamusing a district court to certify an interlo-

cutory appeal is ever appropriate and whether certification of a forum non conveniens ruling is proper); that there is a direct conflict among the circuit courts on most of the issues presented; and the Court of Appeals has, without explanation, summarily defied the law of its own circuit (as expressed in Garner v. Wolfinbarger concerning interlocutory appeals and Castanho concerning mandamuses of forum non conveniens orders), we hereby pray for the following relief:

1. An Order staying any further proceedings in the Court of Appeals until this Court has had time to take such action as it deems appropriate.[32] (a request for stay is also being separately submitted).

2. A writ of mandamus and/or prohibition under the All Writs Act, vacat-

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32 If the Court does not stay the Court of Appeals (which has in effect stayed the district court, see Appendix 5), it could very well render a decision

ing the Court of Appeals' order of July 20, 1984 and October 2, 1984 and direct-in that this cause be remanded to the district court for further handling as it, in its discretion without any coercion by the Court of Appeals on the certification question, may deem appropriate.

3. In the alternative, grant a statutory (permissive) and/or common law certiorari on the questions of the propriety of the de facto mandamus by the Court of Appeals and whether, in any event, certification was appropriate in this case.

4. In the further alternative, grant a per curiam remand to the Court of Appeals, directing it to vacate its order of July 20, 1984 and October 2, 1984 and to call for the complete record and transcript of the district court and undertake full and complete consideration

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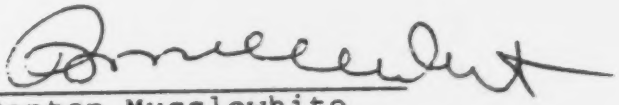
prior to the action of this Court, thus perhaps depriving the Plaintiffs of the right to complain of the Court of Appeals' de facto mandamus.

of the case before deciding whether to take the rare and extraordinary action of mandamus.

5. Such other and further relief as this Court may deem appropriate in the circumstances.

Respectfully submitted,

BY: 

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ATTORNEY FOR PETITIONERS

APPENDIX 1

Muigawah MUNUSAMY

v.

McCLELLAND ENGINEERS, INC., et al.

Steven Peter CROW

v.

OCEANEERING INTERNATIONAL INC.

William Wayne PICCO

v.

GLOBAL MARINE DRILLING CO. et al.

Civ. A. Nos. B-81-800-CA. B-82-143-CA and B-82-709-CA.

United States District Court

E.D. Texas,

Beaumont Division

Jan. 30, 1984

Maritime death and injury actions were brought by foreign plaintiffs against American and foreign defendants in which it was alleged that negligent acts, both here and abroad, of American-owned firms injured them aboard vessels at sea owned or controlled

by United States defendants or their foreign surrogates. Defendants moved to dismiss under doctrine of forum non conveniens. The District Court, Joe J. Fisher, J., held that cases would not be dismissed.

Motion denied.

1. Federal Courts 45

Doctrine of "forum non conveniens" allows court in exceptional circumstances to resist imposition upon its jurisdiction even when jurisdiction and venue are proper.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 45

In ruling on motion to dismiss on grounds of forum non conveniens, court must find that acceptable alternative forum exists.

3. Admiralty 1.20(5)

Eight factors influence choice of law in maritime injury cases: place of wrongful act; law of flag; allegiance or domicile of plaintiff; allegiance of defendant shipowner; place of contract; inaccessibility of foreign forum; law of forum; and defendant's

base of operations.

4. Federal Courts 45

Forum non conveniens dismissal presupposes at least two forums wherein defendant is amenable to due process. U.S. C.A. Const. Amend. 5.

5. Federal Courts 45

Maritime death and injury cases brought by foreign plaintiffs against American and foreign defendants in which it was alleged that negligent acts of American-owned firms injured them aboard vessel at sea owned or controlled by United States defendants or their foreign surrogates would not be dismissed on forum con conveniens grounds, where plaintiffs merely chose forum with most advantageous law available to them and not to harass defendants, relative ease of access to sources of proof was identical regardless of whether American or foreign forum was chosen, and public interest did not require dismissal.

Benton Musslewhite, G. Robert Friedman, Friedman & Chaffin, Houston, Tex., for plaintiffs.

James Patrick Cooney, Royston, Rayzor, Vickery & Williams, Marion E. McDaniel, Eastham, Watson, Dale & Forney, Jack L. Albritton, Fulbright & Jaworski, G. Byron Sims, Brown, Sims & Ayre, Houston, Tex., for defendants.

MEMORANDUM ORDER

JOE J. FISHER, District Judge

Before the court are three maritime death and injury cases brought by foreign plaintiffs against American and foreign defendants. The Defendants in each case urge the court to dismiss under the doctrine of forum non conveniens. They argue that the court must choose to apply foreign rather than U.S. law because the Plaintiffs' injuries have insufficient connection with the U.S.

In effect, the Defendants insist that the foreign Plaintiffs, injured abroad by the negligence of U.S. owned firms, cannot pursue a cause of action in tort against them in a U.S. court even though jurisdiction and venue are in each case proper.

While the facts of the cases differ, the issues raised by the Defendants are essentially the same in each and relate to basically common fact patterns.

The court therefore consolidates the causes for purposes of ruling upon the Defendants' motions to choose foreign law and to dismiss for forum non conveniens.

The Plaintiffs insist the court has jurisdiction by virtue of:

(1) 28 U.S.C. 1350, which provides that "(t)he district courts. . . have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

(2) 28 U.S.C. 1331 for those rights of action "aris(ing) under the Constitution, laws or treaties of the United States...,"

(3) 28 U.S.C. 1332 insofar as the Plaintiffs' claims are between "citizens of a State and citizens or subjects of a foreign state,"

(4) 28 U.S.C. 1333 to the extent they plead a "civil case of admiralty or maritime jurisdiction..." It is the opinion of the court, and Defendants do not disagree, that subject matter jurisdiction is proper.

The Plaintiffs' complaints advance the following causes of action:

(1) the Jones Act, 46 U.S.C. 688, giving injured seamen a right of recovery for negligence of their employers;

(2) the General Maritime Law of the United States and of Nations;

(3) the Death on the High Seas Act. 46 U.S.C. 761 which creates a right of recovery for wrongful death on the high seas beyond a marine league of the U.S. coast;

(4) as created by the laws of foreign countries per 46 U.S.C. 764, providing that a right of action under foreign law for wrongful death on the high seas "may be maintained in an appropriate action in admiralty in courts of the U.S. . .,"

(5) the Texas Death (and Injury) in a Foreign State Statute, Tex.Rev.Civ.Stat.Ann. art 4678 (Vernon 1952 & Supp.1982), extending to citizens of nations with equal treaty rights of action for wrongful death and personal injuries in the courts of this State ;

(6) Texas common law of negligence and products liability.

Venue has not been challenged and no inter-district transfer sought. The court finds venue proper under 28 U.S.C. 1391. Defendants demand that the court choose foreign law to govern each case. They persuasively argue that recent opinions of the Court of Appeals for the Fifth Circuit mandate the choice of foreign law and entail dismissal per forum non conveniens. See De Oliverira v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir., 1983); Bailey v. Dolphin International, Inc., 697 F. 2d 1268 (5th Cir.1983); Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir.1983); Zekic v. Reading & Bates Drilling Co., 680 F.2d 1107 (5th Cir.1982); Chiazor v. Transworld Drilling Co., 648 F. 2d 1015 (5th Cir.1981).

FORUM NON CONVENIENS

DISMISSAL "IN EXCEPTIONAL CIRCUMSTANCES"

(1) The doctrine of forum non conveniens allows a court, "in exceptional circumstance," to "resist imposition upon its jurisdiction" even when jurisdiction and venue, as here, are proper. Gulf Oil Corp. v. Gilbert, 330 U.S.501,504, 67 S.Ct. 839,841,

91 L.Ed. 1055 (1946). Invocation of the doctrine suggests some misuse of the venue by the plaintiff, for instance when he seeks some harassment." Id. at 507, 67 S.Ct. at 842

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. Gilbert, 330 U.S. at 508, 67 S.Ct. at 843.

Gilbert fully enunciated the federal doctrine of forum non conveniens. Cowan v. Ford Motor Co., 713 F. 2d 100 (5th Cir. 1983). The Court explained that its invocation "presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." Gilbert, 330 U.S. at 507, 67 S.Ct at 842.

(2) Initially, the district court must find that an acceptable alternative forum exists. Cowan, 713 F.2d at 103. If its existence be established, "the court, exercising its discretion, must balance and consider both the private interests and public interests at stake in the choice of forum." id.

In Gilbert the Court outlined private interests which control a forum non conveniens dismissal:

(1) relative ease of access to sources of proof:

(2) availability of compulsory process for attendance of unwilling witnesses;

(3) the cost of obtaining attendance of willing witnesses;

(4) possibility of a view of the premises; and

(5) enforceability of a judgment.

The public interests noted by the Court are:

(1) "administrative difficulties" of crowded dockets;

(2) the imposition of jury duty upon citizens whose community has no relation to the litigation; and

(3) burdening the court with applying "a law foreign to itself." Id. 330 U.S. at 508-09, 67 S.Ct at 843.

The Court did not explain the relative importance of the public and private interests. In a later opinion, however, the Court noted that "dismissal will ordinarily by appropriate where trial in the plaintiff's chosen forum

imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." Piper Aircraft v. Reyno, 454 U.S. 235, 249, 102 S.Ct 252, 262, 70 L.Ed.2d 419.

The Court concluded that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." Id., 454 U.S. at 255, 102 S.Ct. at 265, citing Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524, 67 S.Ct. 828, 831, 91 L.Ed. 1067(1947). "When the home forum has been chosen, it is reasonable to assume that this choice is convenient." Piper, 454 U.S. at 255-56, 102 S.Ct. at 265. The court agrees, particularly where, as here, the home forum of the defendant has been chosen. To the contrary however, the Supreme Court viewed the assumption as "much less reasonable" when the plaintiff is foreign and has chosen a U.S. forum. Id.

In addition, the choice of law influences the forum non conveniens dismissal decision in maritime cases. This is so because, if United States law applies, the court would normally entertain the

suit. Bailey, 697 F.2D at 384, citing Fisher v. Agios Nicolaos V., 628 F.2d 308, 315 (5th Cir. 1980) cert. denied sub nom. Valmas Bros. Shipping, S.A. v. Fisher, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981). But see Piper, 454 U.S. at 257, 102 S.Ct. at 266. When foreign law applies, however, "the court may dismiss the suit if there is another more convenient forum." Fisher v. Agios Nicolaos V., 628 F.2d at 314.

THE CHOICE OF LAW

The Defendants ask the court to find that U.S. law does not govern the torts alleged by the Plaintiffs. In particular, Defendants assert the Jones Act and the General Maritime Law do not apply.

(3) The Supreme Court addressed choice of law in maritime injury cases in three consistent opinions: Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); Romero v. International Terminal Operating Co., 358, U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970). Eight

"factors" are said to influence the choice of law in maritime injury cases:

(1) place of the wrongful act;

(2) law of the flag;

(3) allegiance or domicile of the plantiff;

(4) allegiance of the defendant shipowner;

(5) place of the contract;

(6) inaccessibility of a foreign forum;

(7) law of the forum;

(8) defendant's base of operations.

The "factors" suggest a simple, mechanistic approach to choice of law. The appearance is deceptive, however, because the "factors" are neither all comparable nor of equal significance. For example, "factors" (1) through (5) and (8) are themselves potential choices of law, as well as facts which influence the choice of law. "Factor" (6) is irrelevant to choice of law; it pertains only to the propriety of forum non conveniens dismissal. Moreover, "factor" (7), which suggests the court should compare the laws of the potential forums, has since been negated by the Court.

See Piper, 454 U.S. 235, 102 S.Ct. 252.

Courts and counsel who attempt to apply Lauritzen and its siblings, Romero and Rhoditis, by adding the number of national "contacts" with the "factors" miss the point. The Lauritzen discussion of "factors" was not a demonstration of how to make a choice of law in maritime cases. The discussion illustrated why the Court's conclusion was proper: that the law of the flag governs maritime injury claims. Lauritzen simply discussed the potential choices of law in maritime cases. The Court used the facts of the Lauritzen case as examples supporting a rule of law, not as reasons for making a choice of law.

In Lauritzen the Court emphasized the "universal rule of maritime law. . . which gives cardinal importance to the law of the flag." The Court in Romero held that the law of the flag controlled the maritime tort in U.S. territorial waters. The Court relied on the shipowner's "base of operations" to apply U.S. law in Rhoditis, effectively equating the newly found "factor" with law of the flag.

In the wake of the Court's decisions above, the law was that:

(1) the place of the wrongful act was of minimal significance. Lauritzen, 345 U.S. at 584, 73 S.Ct. at 929; Romero, 358 U.S. at 384, 79 S.Ct. at 486;

(2) law of the flag was virtually the automatic choice of law, absent powerful reasons to the contrary. Lauritzen, 345 U.S. at 584-86, 73 S.Ct. at 929-30; Romero, 358 U.S. at 394, 79 S.Ct. at 486, Rhoditis, 398 U.S. at 308, 90 S.Ct. at 1733;

(3) the allegiance or domicile of the injured was not a weighty consideration, nor was

(4) the allegiance of the shipowner given great importance. Lauritzen, 345 U.S. at 586-87, 73 S. Ct. at 930; Romero 358 U.S. at 383, 79 S.Ct. at 486; Rhoditis, 398 U.S. at 310, 90 S.Ct. at 1734.

(5) the place of the contract was virtually insignificant absent a forum selection clause as to tort claims. Lauritzen, 345 U.S. at 588-89, 73 S.Ct. at 931; Romero, 358 U.S. at 383, 79 S.Ct. at 486; Rhoditis, 398, U.S. at 310, 90 S.Ct. at

1734; and

(6) the base of operations was effectively equivalent to the law of the flag as the preferred choice of law, at least where the base was in the U.S. Rhoditis, 398 U.S. at 310, 90 S.Ct. at 1734.

In other words, the Court held the law of the flag or its functional equivalent base of operations to be the choice of law in maritime injury cases both here and abroad.

Later applications of the Lauritzen-Romero-Rhoditis analysis by district and appellate courts, however, made the relative significances of the "factors" almost infinitely variable. See, e.g., De Oliveira, 707 F.2d 847; Borralho, 696 F.2d 379; Chiazor, 648 F.2d 847; Borralho, 696 F.2d 379; Chiazor, 648 F.2d 1015. In the Fifth Circuit, for example, choice of law now appears to consist of "weighing" the "substantiality of contacts"—not just "quantitatively," but "qualitatively," as well—between the complaint and the U.S. Moreover, the analysis entails the realization that "certain of the eight

(Lauritzen and Rhoditis) factors may be substantial in one context. . .(and) of less importance is another." Chiazor, 648 F.2d at 1018. The possibility of a shift in substantiality introduced by Chiazor greatly reduces the utility of the already questionable "factor weighing" approach to the choice of law. The court fears that each "factor's" significance is sufficiently obscure or variable to justify any judicial conclusion.

CHOICE OF LAW AND FORUM NON CONVENIENS IN THE FIFTH CIRCUIT

The controlling opinions, called by one Plaintiff's counsel "the rig cases," are the parentela of Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir.1981). Therein the Court of Appeals affirmed the district court's decision "declining jurisdiction" over the death claim of a Nigerian employee of a U.S. owned Nigerian firm killed aboard a relatively immobile drilling vessel owned by a Bahamian subsidiary of a U.S. firm. Concluding that the district court had necessarily, although not expressly, rejected U.S. law, the Court of

Appeals found no abuse of discretion in the dismissal for forum non conveniens.

The decision of a district court to apply Italian law to the claim of a Yugoslav injured aboard his American employer's affiliates' drilling vessel in Italian territorial waters was affirmed. Zekic v. Reading & Bates Drilling Co., 680 F.2d 1107 (5th Cir. 1982). The Court of Appeals remanded the case, however, fearing the district court had ordered its dismissal as "an automatic response." The Court emphasized that the district judge should exercise his discretion in deciding to dismiss, rather than infer that Chiazor required dismissal automatically.

In Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir.1983), the court affirmed the district court's rejection of American law to control the wrongful death claim of a Brazilian seaman injured abroad in the employ of an American owned Brazilian drilling company. The court found the "contacts" of the claim to be insufficiently "substantial" and "qualitatively" inadequate to apply U.S. law. The district court did

not, the Court of Appeals held, abuse its discretion in dismissing under forum non conveniens. The court noted that "the distinction between foreign and resident plaintiffs for choice of law purposes. . . is fully justified, as recognized by the Supreme Court. . ." citing Piper Aircraft v. Reyno, 454 U.S. 235 102 S.Ct. 252, 70 L.Ed.2d 419, and Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254. Moreover, the court noted, "(t)he Constitution does not require the United States, as a condition of applying its laws to its own citizens and residents, to be courthouse or law maker to the world." Borralho, 696 F.2d at 390.

The district court dismissed the claims of a Filipino employee of a Houston-based Panamanian subsidiary of a Texas corporation, drowned off Indonesia when his employer's drilling vessel capsized. The appellate court concluded the "contacts" with foreign nations were "clearly more substantial than those with the United States." Bailey v. Dolphin International, Inc., 697 F.2d 1268 (5th Cir.1983). As in Zekic, the Court of Appeals remanded and suggested

a revised dismissal order. The objective, it noted, "is not to locate the forum conveniens, but to avoid the forum non conveniens." Bailey, 697, F.2d at 1279, quoting Casad, Long Arm & Convenient Forum, 20 Kan.L.Rev. 1, 14 (1971). Of course, such a dismissal assumes the existence of at least one specific forum more conveniens.

The Court of Appeals rejected the district court's decision to apply U.S. law to the claim of a Brazilian injured offshore between a U.S. vessel and a drilling rig operated by a U.S. owned Brazilian company. De Oliveira v. Delta Marine Drilling Co., 707 F.2d 843, 847 (5th Cir.1983). The court held that Brazilian law applied to the claim and that retention of jurisdiction by the U.S. court would work an injustice.

The Defendants offer the above opinions as authority that the foreign seamen before the court should be denied the benefit of U.S. law and trial in a U.S. court, as well. They argue that the substantiality of the foreign "contacts" so outweighs the causes' "contacts" with the U.S. as to make foreign

law the proper choice. And a choice of foreign law, Defendants insist, compels the court to dismiss under the doctrine of forum non conveniens.

ECONOMIC INCONVENIENCE?

There exist, the court realizes, compelling economic arguments in favor of denying the benefits of U.S. law and a U.S. forum to foreigners. The "social cost" imposed by the entertainment of such foreign maritime injury claims is considerable. Even greater is the burden imposed on U.S. corporate assets.[1]

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[1] In the typical maritime injury case, the foreign plaintiff is limited under foreign law to some type of worker's compensation for his death or injury. Often there are statutory limits to the size of recoveries. By U.S. standards the benefits are generally minimal, if not grossly inadequate. Compared to the plaintiff's wage scale and living standard, however, the foreign benefits seem less niggardly.

But if the plaintiff's sovereign mandates low or even inadequate benefits, why should American owned enterprises not profit therefrom? The lower costs of injuring foreign workers merely reflect the lower costs of foreign labor generally. Comity suggests the foreign nation's opinion, legislative or judicial, of its citizens' worth should be respected. Implicit in the recent

While such economic arguments are rational and persuasive, it appears that the Court of Appeals has not relied thereon. Rather, the court employed carefully crafted, abstract choice of law analyses. Moreover, such economic policy decisions are for Congress to

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1 (Cont.)
opinions of the Court of Appeals for the Fifth Circuit is the notion that U.S. courts should not value the lives and injuries of foreign maritime workers higher than would a foreign court. If not for comity, then for economic reasons, a U.S. court should, it can reasonably be argued, defer to foreign law.

That the foreign plaintiff's recovery in a foreign forum may be substantially lower than in the U.S. simply strengthens the economic argument in favor of ejecting foreigners. Lower damage awards under foreign law equal lower liability for U.S. owned enterprises. And lower liability ultimately translates into higher profits and greater wealth for U.S. citizens. Such foreign penury vis-a-vis that nation's citizens is an economic gain to U.S. investors no less than a foreign land's subsidization of its exports enriches U.S. consumers.

By the same reasoning, the so-called flag of convenience should be respected. In free nations, every flag is one of "convenience." Vessel owners select the most economically beneficial registry available to them, and why not? If U.S. owners can better compete using Liberian or Panamanian flag vessels, for example, what justifies denying them that advantage? Finding a vessel to be de facto a U.S. flag

make, and not for the courts. For example, the 1982 amendment to the Jones Act exemplified a change of policy--narrowing the applicability of U.S. law to foreign workers- in response to economic interests 96 Stat. 1956. See 128 Cong. Rec.S. 14,364 (daily ed. Dec. 10, 1982).[2]

The interest in public, rather than private, economy may be the real reason courts so readily affirm the dismissal of such foreign maritime claims. Although few opinions explicitly say so, see, e.g.,

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1 (Cont.)
ship may simply penalize American investors to reward an alien plaintiff.

Aggressive "unveiling" of corporate alter egos has similar economic consequences. U.S. owned enterprises are denied the benefits of reduced and limited liability under foreign law, thereby depleting U.S. assets to reward foreigners.

2 While much of the debate on the amendment spoke euphemistically of the need to "clarify" existing, confusing case law, Senator Long spoke directly to the issue. He remarked, "Mr. President, American offshore service companies and their foreign subsidiaries are being severely impacted (sic) by a multitude of lawsuits, aggregating claims over a billion dollars, brought by foreign offshore oil and gasfield workers." 128 Cong.Rec.S. 14364 (daily ed. Dec. 10, 1982).

Bailey, 697 F.2d at 1278, some courts apparently use the forum non conveniens dismissal to shrink their dockets. This court well appreciates the dilemma of a growing backlog of cases as filings exceed closings each month. Moreover, since domestic juries and the public fisc support the courts, "native" cases should perhaps have first claim on the resources of the judiciary. If some plaintiffs must be turned away from a crowded courthouse, better they be foreigners than Americans, one might conclude. Congress, however, must make that policy decision, as well. Inasmuch as this court has uncontested jurisdiction of the cases, it is reluctant to decline its exercise absent compelling reasons to do so.

THE FOREIGN SEAMEN'S "CONTACTS" WITH THE U.S.

Applying the Lauritzen-Romero-Rhoditis analysis to the cases, the court finds the following significant: Plaintiffs allege that negligent acts--here and abroad--of American owned firms injured them aboard vessels at sea owned or controlled by U.S. defendants of their foreign surrogates. Clearly, it is

arguable whether the claims of the Plaintiffs have "substantial" or even significant "contacts" with the U.S. Such nebulous and misused words simply encourage legal argument ad nauseam. Undisputed, however, are the injurious and fatal contacts between the Defendants' vessels and the bodies of the Plaintiffs. Those are the real and truly significant contacts confronting the court.

Contrary to the holdings of the Supreme Court, Defendants insist on foreign choices of law. That Plaintiffs are aliens injured abroad by ostensibly foreign companies is dispositive in the Fifth Circuit, they argue. The Court of Appeals apparently condoned such discrimination, ostensibly relying upon Piper and Lauritzen. See Borralho, 696 F.2d at 390. The court, however, is reluctant to so readily reject the admiralty claims of foreign seamen. Moreover, the court believes that the law in the Fifth Circuit does not so require.

The context of the instant cases is not, the court believes, such as to cause a "Chiazor shift"

in the substantiality of the Lauritzen-Rhoditis "factors". See Chiazor, 648 F.2d at 1018. Absent proof that the vessels involved were permanently stationed in foreign territorial waters, the flags of the vessels and the Defendants' bases of operations remain the important facts for choice of law. If the flags or bases of operations of the vessels are either actually or effectively of U.S. identity as alleged, a U.S. choice of law would be virtually compelled by Lauritzen, Romero, and Rhoditis. The facts crucial to the choice of law decisions require further development.

The undisputed facts, e.g., the non-U.S. situs of each tort and the foreign citizenship of the Plaintiffs, are not determinative. As to the foreign situs, there is no apparent inequity in requiring a U.S. defendant to answer for his actions, wherever committed, under U.S. law. This is especially so with maritime tort law, because claims frequently arise outside U.S. territory.

Second, the court perceives no justification or

fairness in altering the standard of care imposed upon vessels or maritime employers according to the nationality of the victim. See, e.g., Rhoditis, 398 U.S. at 309-10, n. 5, 90 S.Ct. at 1734 n. 5. Moreover, at the time of the torts the Jones Act drew no such distinction between domestic and foreign seamen employed upon U.S. vessels. See, e.g., 46 U.S.C. sec. 688 & 713. Neither should the General Maritime Law be applied discriminatorily to foreign seamen on U.S. vessels, the court believes. See Romero, 358 U.S. at 382, 79 S.Ct. at 485.

"EQUALITY OF TREATMENT TO ALL SEAMEN ..."

Third, the maritime law of the U.S. prohibits such discriminatory treatment of foreign seamen. Shipowners' Liability (Sick and Injured Seamen) Convention, October 24, 1936, 54 Stat. 1693 (the Treaty) The Treaty defines the minimum "liability of ... shipowner(s) in case of sickness, injury, or death of seamen." It does not, however, "affect any Law, award, custom, or agreement between shipowners and seamen which ensures more favorable conditions than

those provided by th(e) Convention." Id. See DeZon v. American President Lines, 318 U.S. 660, 667, n. 3, 63 S.Ct. 814, 818 n. 3, 87, L.Ed. 1065 (1942); O'Donnell v. Great Lakes Co., 318 U.S. 36 42, 63 S.Ct. 488, 491, 87 L.Ed. 596(1942).

Moreover, the Treaty expressly requires "equality of treatment to all seamen (injured on the high seas) irrespective of nationality, domicile or race." 54 Stat. 1700.[3] The court believes this to be an important requirement, although it appears not to have been raised heretofore. It is the opinion of the court that the clear language of the Treaty forbids choice of law according to the nationality or domicile of the plaintiff.

Supreme Court holdings are not contrary. In Lauritzen, for example, the Court did not predicate its choice of law on the seaman's nationality or domicile. Rather, it gave "cardinal importance to

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[3] One could argue logically that to apply the law of the seaman's nation would provide "equality of treatment." But that proposition has a rhetorical flaw relative to the rest of the clause: "irrespective of nationality, domicile, or race."

the law of the flag," directing that "it must prevail unless some heavy counterweight appears." Id., 345 U.S. at 586, 73 S.Ct. at 930. In Piper no seamen were involved, so the Court's discriminatory treatment of foreign plaintiffs did not offend or involve the Treaty.

The Court earlier emphasized the importance of "equality of treatment" and U.S. leadership in maritime tort law. The aim of the Convention, the Court explained, was "to equalize operating costs by raising the standards of member nations to the American level." Warren v. U.S., 340 U.S. 523, 527, 71 S.Ct. 432, 435, 95 L.Ed. 503 (1951). For that reason alone, the court should probably decline to choose foreign law when it imposes a lower standard of care or relief than domestic law.

With respect to not only the Jones Act and General Maritime Law claims of the Plaintiffs, but the wrongful death,[4] negligence, and product liability

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[4] In the death cases, the court must choose between applying the Death on the High Seas Act or a non-federal wrongful death law. Defendants' argument

claims,[5] as well, the court's conclusion is clear: choice of law cannot be influenced by the "nationality, domicile, or race" of the seamen.

Finally, the court perceives the facts crucial to the choice of law determinations to be inseparably woven with the merits of the causes. The apparent extent of effective U.S. ownership and control of: the vessels, the victims' employers, and the other entities involved is such as to require deferring the choice of law until the evidence has been presented on the merits.

Moreover, to decide that, e.g., the Jones Act does not apply is, in effect, to decide that the

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4 (Cont'd)
that DoHSA excludes the other theories is correct, but only if DoHSA applies. Finding DoHSA inapplicable, however, leaves available the Texas and foreign wrongful death actions. Since no jurisdictional problems exist, the Plaintiffs will be able to proceed under some theory in this forum.

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Whether to apply Texas or foreign law of negligence or products liability raises similar problems. One or another theory, however, will be appropriate. Moreover, since Texas allows plaintiffs to pursue a foreign cause of action in its courts, a choice of foreign law would not result in wasted effort before this court.

plaintiff has failed to prove his complaint. At first glance, Defendants seem to urge the equivalent of a summary judgment motion. Implicit in their argument is the proposition that the plaintiff has failed to state a claim for relief. The hidden premise--that such foreign seamen have no cause of action under U.S. maritime law--remains . Since the Plaintiffs allege wrongs committed by American vessels or employers, to reject U.S. law is but to rule on the merits of their claims. Naturally, the court must defer ruling on the merits until all the evidence is presented. If at that time the court chooses foreign law, it will so instruct the juries or rule accordingly.

The court realizes that its decision to apply U.S. law would not necessarily preclude dismissal for forum non conveniens. See, e.g., Bailey, 697 F. 2d at 1274; Borralho, 696 F.2d at 384. Out of fairness to the parties, the court must, therefore, consider dismissing the causes for forum non conveniens at this time. To wait until trial begins and then

dismiss would be unfair to all. It would cause considerabel and real, rather than merely, abstract, inconvenience.

IS THIS A FORUM NON CONVENIENS?

(4) A forum non conveniens dismissal "presupposes at least two forums" wherein the defendant is amenable to process. Gilbert, 330 U.S. at 507, 67 S.Ct. at 842. In their briefs, Defendants state that suitable alternative forums exist; that appears to be correct. And although the Defendants have not yet shown it to be true, the court assumes, arguendo, that "complete relief can be obtained in the supposedly more convenient forum" 15 C. Wright. A. Miller & E. Cooper, Federal Practice and Procedure section 3828 (1976).

(5) In considering the "convenience" of the parties, particularly of the Defendants, the court relies on the Gilbert analysis. Abstract notions of convenience, however, are difficult to apply to real cases. Of necessity, the court must work with concrete facts. In the context of these cases, convenience means money. Inconvenience equals cost, nothing more.

There are two obvious reasons the foreign plaintiff would choose this forum over his home:

(1) to harass the defendants; or

(2) to maximize his recovery.

Perhaps the foreign Defendants can show harassment; they have yet to do so. The U.S. Defendants, however, surely do not suggest that suit in one's home court equals harassment. The court detects no harassment by the Plaintiffs, but believes they chose a U.S. forum for the second reason. It is manifest that the Plaintiffs simply chose the forum with the most advantageous law available to them. "Convenience" had little, if anything to do with the choice. Neither are the Defendants' dismissal motions concerned with convenience. Like the Plaintiffs, the Defendants simply seek dismissal to a forum where the law is more advantageous to them. So far, it is a zero sum game; the score is tied. For this very reason, a change in substantive law should not be considered in a forum non conveniens inquiry. See Piper, 454 U.S. at 247, 102 S.Ct. at

THE PRIVATE INTERESTS

In reviewing the private interest of the litigants, i.e., the costs of preparing and trying a case here versus abroad, the court discerns an approximate balance of the total costs between the alternatives and the parties.

The relative ease of access to sources of proof is identical regardless of the forum. It is not the forum court, after all, but the parties' attorneys,[6] who must go to the sources and gather evidence. Granted that much of the evidence is abroad. How are sources of proof made less accessible by trial in Texas instead of abroad? In either event, the situs is no more or less "accessible." The Plaintiffs' attorneys must travel there to gather evidence, as

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[6] The court assumes that the parties were and should be free to choose their counsel for whatever reasons they prefer. Plaintiffs and Defendants have all selected U.S. attorneys, presumably hiring the best available to them. They are free, of course, to retain foreign counsel to assist in the preparations for trial, should they wish.

must the Defendants'. Such would be the case were the action tried abroad. Other sources of proof will ordinarily be domestic. For example, expert medical and liability witnesses are likely to be U.S. residents. They too are equally accessible to Plaintiffs and Defendants.

The availability of compulsory process is a potential problem, but not an insolvable one. Moreover, it exists regardless of the forum chosen. Naturally the witnesses abroad are generally beyond the reach of this court, just as U.S. witnesses are beyond a foreign one. Many witnesses, however, are likely to be under the control of the Defendants. Such potential witnesses as employees of the Defendants and their subcontractors, for instance, are under the economic control of the Defendants and require no judicial compulsion to appear.

The assistance of foreign courts in gathering evidence is available via letters rogatory. Fed.R. Civ.P. 28(b); 28 U.S.C. 1781 et seq.; see Bishop, International Litigation in Texas: Obtaining Evidence

in Foreign Countries, 19 Hou.L. 361 (1982). Finally, if crucial witnesses must be compelled to offer testimony, the Plaintiffs can be required to file suit in the foreign forums to facilitate discovery in the domestic cases. Both parties should agree, of course, that evidence taken in either forum could be used in the other.

The cost of bringing willing foreign witnesses to trial is an expense that both parties must bear, regardless of the forum chosen. Foreign witnesses must be brought to a U.S. forum; U.S. witnesses must travel to a foreign forum. Other witnesses, like itinerant workers, would require transportation to either forum. Of course, for many such witnesses, depositions or videotaping of their testimony is the preferred form of evidence. Those witnesses need not be transported.

In addition, the court considers the cost of the attorneys' attendance at trial. Their appearance in this forum requires minor travel time. Were the case tried abroad, counsel for Plaintiffs and

Defendants would incur the cost of further trips abroad.

The possibility of a view of the premises does not concern the court. The usual exhibits adequately display the maritime worksites where plaintiffs are injured. Considering the hazards of the sea, the court has no desire to view any of the maritime premises here involved, nor would it allow a jury to do so. See, e.g., Bailey, 697 F.2d 379 (crewman drowned when rig capsized); De Oliveira, 707 F.2d 847 (workman struck by "widowmaker" after fall into sea). As for the parties, they may view the premises with equal ease whichever forum is chosen.

The point is that most of the private expenses are unavoidable. The choice of forum does not eliminate the costs; it merely temporarily shifts some to another pocket. The private interests of the Plaintiffs and Defendants are, it appears, virtually in equipoise. There being no "exceptional circumstances," Gilbert, 330 U.S. at 504, 67 S.Ct. at 841, the Plaintiffs' choice of forum should not be

disturbed by the mandane conflict of private interests.

THE PUBLIC INTERESTS

Public interests remain to be considered, but they mostly relate to the interests of this court in controlling its swollen docket. Like other federal courts, this one has a steadily growing backlog of cases. And the court does not wish to become a haven for admiralty lawyers in search of a friendly port. The court is not yet so unproductive, however, that it must turn away foreign seamen who seek relief from U.S. defendants.

To impose jury duty upon citizens of this district is not burdensome considering the strong economic role of the maritime and petroleum industries in the economy of the Eastern District. The citizens of this community have an intimate relation with the litigation of offshore oil industry and maritime injury claims because so many directly or indirectly make their livings from those industries.

The prospect of "untangling problems in conflict

of law" does not deter the court. The court perceives the possibility of applying "law foreign to itself" as a challenge, not grounds for abdication. If the court is inadequate to either task, the Court of Appeals will indubitably correct any errors.

The public interests, the court concludes, do not require dismissal of these Plaintiffs' causes. Moreover, no injustice is likely to result from trial in a federal court. To the contrary, injustice is far more likely to result if the foreign seamen are dismissed. Moreover, such dismisal would be contrary to federal maritime law.

The court understands the Treaty to apply to forum non conveniens decisions no less than to choice of law decisions. The Treaty requirement of "equality of treatment to all seamen dictates that the foreign seaman be treated the same as an American seaman in the same circumstances. It is inconceivable that a federal admiralty court would dismiss an American seaman suing a U.S. vessel or employer on forum non con-

veniens grounds. The court must, therefore, treat these foreign seamen the same. For that reason and given the admiralty court's traditional regard for seamen of all nations, as well the reluctance of this court to avoid its constitutional and statutory duties, it is

ORDERED, ADJUDGED and DECREED that the motions of the Defendants to dismiss for forum non conveniens be and are hereby DENIED, and the cases set for jury selection and trial in the next term of the court.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MUIGAWAH MUNUSAMY	)	
	)	
VS.	)	CIVIL ACTION NO. B-81-800-CA
McCLELLAND ENGINEERS, INC.	)	
	)	
ET AL	)	
STEPHEN PETER CROW	)	
	)	
VS.	)	CIVIL ACTION NO. B-82-143-CA
OCEANEERING INTERNATIONAL, INC., ET AL	)	
WILLIAM WAYNE PICCO	)	
	)	
VS.	)	CIVIL ACTION NO. B-82-709-CA
GLOBAL MARINE DRILLING CO., ET AL	)	

ORDER OF THE COURT

Came on this day to be heard the motion for certification of the defendants in the above-styled and numbered causes; and the Court, having considered the motion, is of the opinion that, and it is, therefore

ORDERED, ADJUDGED and DECREED that the Motion

for Certification be and is hereby in all things DENIED.

SIGNED AND ENTERED this 10th day of April, 1984.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

June 15, 1984

JOHN O. JONES

609 FANNIN, SUITE 517
HOUSTON, TX 77002

The following civil case(s) have been set for July election on August 27, 1984 at 9:00 a.m. A Joint Pre-trial Order shall be submitted prior to the date of trial.

JUDGE JOE J. FISHER PRESIDING

Case No.	Style
B-81-800-CA	MUIGAWAH MUNUSAMY VS McCLELLAND ENGINEERS, INC., ET AL

MURRAY L. HARRIS, CLERK

/s/ Olga M. Munch
Olga Munch
Courtroom Deputy
409-839-2645

APPENDIX 4

IN RE McCLELLAND ENGINEERS, INC. et al., Petitioners.

No. 84-84-2363.

United States Court of Appeals, Fifth Circuit.

July 20, 1984

Mandamus was sought directing the district court to vacate its order denying forum non conveniens motions and dismiss the actions or to certify its order for interlocutory appeal. The Court of Appeals, Gee, Circuit Judge, held that refusal to certify was abuse of discretion where opinion rested on novel premises, declined to determine what substantive law would be applied and questioned continuing validity of controlling precedent.

Denied with a request for certification.

1. Federal Courts 660

District court's refusal to certify for interlocutory appeal its ruling denying motions to dismiss for forum non conveniens was abuse of discretion where opinion rested on novel premises, declined to determine what substantive law was to be applied at trial and

appeared to question the continuing validity of controlling precedent of higher courts.

2. Federal Courts 45

First step in any forum non conveniens analysis is a determination of what substantive law governs.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before GEE, HIGGINBOTHAM and DAVIS, Circuit Judges.

GEE, Circuit Judge:

(1) In these three cases filed by foreign persons seeking to recover damages for injuries suffered far from American shores, the district court denied motions to dismiss for forum non conveniens. Its careful and exhaustive opinion appears at Munusamy v. McClelland Engineers, Inc., 579 F.Supp. 149 (E.D. Tex. 1984). Although the court's opinion rests on novel premises, declines to determine what substantive law is to be applied at trial, and appears to question both the continuing validity of controlling

precedent of this Court and that of the Supreme Court, the trial judge refused to certify his interlocutory order for appeal. The defendants petition for a writ of mandamus either directing the district court to vacate its order denying the forum non conveniens motions and dismiss the actions or to certify its order for appeal. We conclude that the court's refusal to certify in the circumstances presented constitutes an abuse of discretion; we vacate that order. Since we do not doubt that the court will promptly proceed to certify in view of this conclusion and will abide our decision before proceeding to trial, we decline to issue a preemptory order at this time.

(2) The court's opinion states few facts. We gather from the opinion and from the petition for mandamus that all three plaintiffs were foreign nationals and residents; none was a United States citizen. Each was injured or killed on an unconventional vessel engaged in offshore petroleum exploration or production in faraway coastal waters--those

off Borneo, Saudi Arabia and Newfoundland. At least two of the vessels concerned apparently flew foreign flags. These circumstances suggest a choice-of-law inquiry applying the Lauritzen/Rhoditis factors,[1] as adapted to unconventional vessels by the law announced for this Circuit in Chiazor v. Transworld Drilling Co., Ltd., 648 F.2d 1015 (5th Cir. 1981), cert. denied, 455 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed. 2d 136 (1982). The first step in any forum non conveniens analysis is a determination of what substan-

---

[1] As the trial court observed, 579 F.Supp. at 152:

> The Supreme Court addressed choice of law in maritime injury cases in three consistent opinions: Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 252 (1970). Eight "factors" are said to influence the choice of law in maritime injury cases:
>
> (1) place of the wrongful act;
> (2) law of the flag;
> (3) allegiance or domicile of the plaintiff;
> (4) allegiance of the defendant shipowner;
> (5) place of the contract;
> (6) inaccessibility of a foreign forum;
> (7) law of the forum;
> (8) defendant's base of operations.
>
> For the court's use of "influence," however, we would prefer "govern."

tive law governs the case. De Oliveira v. Delta Marine Drilling Co., 707 F.2d 843, 845 (5th Cir. 1983) ("In such cases we must decide what body of law applies, United States or foreign."). But instead of beginning with this first step and proceeding down the well-established path suggested by Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and its progeny, the court's reasoning followed a radically different course.

It commenced its inquiry by addressing the Lauritzen/Rhoditis factors. Our decisions have viewed them as the guides to judgment, but the district court reduced them to mere examples illustrating a rule of law that "the law of the flag or its functional equivalent, base of operations, (governs) the choice of law in maritime injury cases both here and abroad." 579 F.Supp. at 153. Next, it characterized our court's decision in Chiazor as rendering the significance of each Lauritzen/Rhoditis factor "sufficiently obscure or variable to justify any judicial conclusion." Id. Having thus disposed of controlling precedent and

declined to decide what body of law applies, the court embarked on its own novel analysis of the applicable law.

As we understand that analysis, it commences with a 1936 Treaty to which the United States is a party, the Shipowner's Liability (Sick and Injured Seamen) Convention, 54 Stat. 1693. The court notes that the Convention requires "equality of treatment to all seamen (injured on the high seas) irrespective of nationality, domicile, or race." 579 F.Supp. at 156. Next the court seems to suggest that based on the Convention's desired equality of treatment for all seamen, standing alone "the court should probably decline to choose foreign law when it imposes a lower standard of care or relief than domestic law." 579 F.Supp. at 157. Finally, the court proceeds to observe that since "(i)t is inconceivable that a federal admiralty court would dismiss an American seaman suing a United States vessel on forum non conveniens grounds (the) court must treat these foreign seamen the same." 579 F.Supp. at 159. Accordingly, in the court's view, any foreign

seaman injured on the high seas (as these may not have been) is entitled to access to United States courts and United States remedies, apparently whether he is suing a United States vessel or not; and to deny him that access is to deny him "equality of treatment." It is not our place or function at this stage of these matters to assay the merits of the district court's reasoning and analysis; suffice it to say that it represents a candidly novel and clear departure from our holdings and those of the Supreme Court. For that reason, and since the district court has declared its intention not to rule on what law applies "until all the evidence is presented,"[2] we conclude, with great reluctance, that we must intervene.

Such an intervention while rare, is not without respectable precedent. Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir.1982). Indeed, we have ourselves indicated a willingness, in rare circumstances, to intervene directly by mandamus even in the district court's disposition of the forum non conveniens motion

[2] 579 F.Supp. at 157.

tself:

> The question of forum non conveniens arises in this case in the form of a motion to dismiss rather than a motion to transfer under section 140(a) only because the alternative forum is a foreign nation and thus no transfer is possible. See id. We perceive no reason why a petition for a writ of mandamus aimed at the district court's decision on the applicability of forum non conveniens should be treated any differently when based on a motion to dismiss than when based on a motion to transfer, and we therefore turn to the standard applied to petitions involving district court decisions on section 140(a) transfer motions.
>
> In Ex Parte Charles Pfizer & Co., 225 F.2d 720 (5th Cir.1955), we held that a writ of mandamus could not be issued to direct the district courts to enter or vacate orders of transfer under section 1404(a) absent "a failure of the District Court to correctly construe and apply the statute, or to consider the relevant factors incident to ruling upon a motion to transfer, or unless it's necessary to correct a clear abuse of discretion." 225 F.2d at 723. Our decisions make it clear that mandamus is an extremely limited means of challenging the district court's discretion in this area; as Pfizer indicates, a party seeking such a writ must demonstrate a failure on the part of the district court correctly to construe and apply the the relevant factors, or must show some clear abuse of discretion in the court's decision on the forum non conveniens issue. See Garner v. Wilfinbarger 433 F.2d 117, 120-21 (5th Cir. 1970); Exparte Panama-Craft Corp., 236 F.2d 911 (5th Cir.1956); In re First National Bank of Montgomery, 233 F.2d 876 (5th Cir.1956).

astanho v. Jackson Marine, Inc., 650 F.2d 546, 550 (5th ir.1981)(emphasis added).

Such an intervention would be a drastic one indeed.

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Since our action today is far less so, we conclude that it is justified on a correspondingly lesser showing: the demonstration of a substantial likelihood of "a failure on the part of the district court correctly to construe and apply the relevant factors, or. . .some clear abuse of discretion in the court's decision on the forum non conveniens issue." Id. That demonstration, we conclude, has been made here.[3] We therefore request that the district court certify its interlocutory order for appeal. The denial of mandamus is without prejudice. It is so

ORDERED.

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[3] In doing so, we are driven to observe that the parties may experience great confusion in tendering evidence at a time of trial when the dispositive issues—those under the law of Indonesia, or Dubai, or Canada, or the United States—are unknown. Whether these issues would differ significantly from each other depending on the law to be applied we do not know today. We do know, however, that they may. That suffices for present purposes.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MUIGAWAH MUNUSAMY	X	
	X	
VS.	X	C.A. No. B-81-800-CA
	X	
McCLELLAND ENGINEERS, INC. ET AL.	X	
	X	
STEPHEN PETER CROW	X	
	X	
VS.	X	C.A. No. B-82-143-CA
	X	
OCEANEERING INTERNATIONAL, INC., ET AL.	X	
	X	
WILLIAM WAYNE PICCO	X	
	X	
VS.	X	C.A. No. B-82-709-CA
	X	
GLOBAL MARINE DRILLING CO. ET AL.	X	

ORDER

Pending before the Court is Defendants' Motion for Reconsideration of Defendants' Motion for Certification of this Court's Order of January 30, 1984. Having reconsidered Defendants' Motion for Certification, the Court makes the following findings regard-

ing its Order of January 30, 1984, reported at 579 F.Supp. 149:

1. The Order involves controlling questions of law as to which there is substantial ground for difference of opinion; and

2. An immediate appeal from the Order of January 30, 1984, may materially advance the ultimate termination of the litigation.

Based upon the foregoing determinations, the Court hereby

ORDERS that Defendants' Motion for Certification pursuant to Section 1292(b) is granted in its entirety, and that this Court's Order of January 30, 1984, hereby is certified for appeal to the United States Court of Appeals for the Fifth Circuit. The Court further

ORDERS that proceedings in the captioned cases are stayed, pending the Fifth Circuit's decision on appeal.

Entered this 27th day of July, 1984.

/s/ Joe J. Fisher
United States District Judge

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-9106

MUIGAWAH MUNUSAMY, ET AL,

Plaintiffs-Respondents,

versus

McCLELLAND ENGINEERS, INC.,
ET AL.,

Defendants-Petitioners,

On Application for Leave to Appeal
from an Interlocutory Order

Before GEE, JOHNSON and DAVIS, Circuit Judges

By the Court:

IT IS ORDERED that petitioners' application to take an interlocutory appeal from the district court's order denying their motion for dismissal based on forum non conveniens is GRANTED.

IT IS FURTHER ORDERED that respondents' motions for a stay of proceedings and for a severance are DENIED.

APPENDIX 7

EXCERPTS FROM:

S. BENNETT SHARBER, Administrator of the Estate of ROBERT SMYTH and PER SKIPNES, Deceased; ANN SMYTH (Wainwright), Individually and as next friend of Stuart Smyth and David Clayton Smyth, and as English Administratrix of the Estate of Robert Smythe, Deceased; and SIGNE SKIPNES, Individually and as next friend of Ann Helene Skipnes, Niels Skipnes, and Arnt Skipnes, and as Norwegian Administratrix of the Estate of Per Skipnes, Deceased

vs.

OCEAN SYSTEMS INCORPORATED, ESSO EXPLORATION COMPANY, ESSO EXPLORATION NORWAY, INC., EXXON COMPANY, OCEAN SYSTEMS NORGE A/S, OCEAN SYSTEMS UNITED KINGDOM LIMITED AND OCEAN SYSTEMS INTERNATIONAL

Civil Action No. S-75-67-CA

United States District Court

E.D. Texas,

Sherman Division

March 26, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs, surviving widows of Robert Smyth and Per Skipnes, filed this maritime action against

Exxon Corporation, Esso Exploration Company, Esso Exploration Norway, Ocean Systems International, Ocean Systems United Kingdom, and Ocean Systems Norge. Plaintiffs filed this action under Admiralty Rule 9(h) and brought their claims under the Jones Act, The Death on the High Seas Act, and the general maritime law. Plaintiffs' claims arise out of an accident which occurred on January 16, 1974, in the Norwegian Sector of the North Sea, in which decedents died in a diving bell.

2. Ocean Systems, Inc., is a corporation licensed to do business in Texas and doing business in Texas. Ocean Systems International is a wholly owned subsidiary of Ocean Systems, Inc. Ocean Systems, Inc., and Ocean Systems International share officers and directors, as well as, intermingle assets. Ocean Systems United Kingdom is a wholly owned subsidiary of Ocean Systems, Inc. Ocean Systems Norge is a Norwegian company wholly owned by Ocean Systems, Inc., and was formed by Ocean Systems, Inc., in January 1974, in order to comply with the laws of Norway regulating foreign corporations with operations in the Norwegian Section of the North Sea.

6. Ocean Systems International and Esso Exploration Norway entered into a contract calling for the performance of diving services by Ocean Systems International aboard the "Drillmaster" in the North Sea. Ocean Systems, Inc., Ocean Systems International, and Ocean Systems Norge performed services under this contract, and partial performance of the contract by Ocean Systems International and Ocean Systems, Inc., was undertaken in Texas.

7. Per Skipnes was an experienced diver, having worked as a commercial diver since 1962. Skipnes and Ocean Systems International entered into an employment contract; subsequently, Ocean Systems International issued work orders to Skipnes calling for the performance of services as an assistant diving supervisor aboard the "Drillmaster". After his employment with Ocean System International commenced, Skipnes was paid by both Ocean Systems, Inc., and Oceans Systems International; all paychecks to Skipnes were sent from Boston and drawn on a Boston bank.

Robert Smyth was an apprentice diver when he was hired by Ocean Systems International. When Smyth went onto the "Drillmaster" to perform diving services for

the Ocean Systems entities, he had not had previous diving experience, and the incident causing his death was the initial dive in his career. Smyth was paid by Ocean Systems International, with checks drawn on Boston banks.

8. Ocean Systems, Inc., and Ocean Systems International shared the ownership of Diving Bell No. 22. Diving Bell No. 22 was a spherical, submersible, pressure vessel. Diving Bell No. 22 was a special purpose vessel intended for maritime transportation and was a vessel within the meaning of the Jones Act and general maritime law. Cook v. Belden Concrete Products 472 F.2d 999, 1002 (5th Cir.), cert. denied, 414 U.S. 868 (1973). The vessel was in navigation at the time of the incident, Erwin v. Lykes Brothers Steamship Co., 472 F.2d 1217, 1219 (5th Cir. 1973); and the decedents, employees of the Ocean Systems entities were seamen on board the vessel engaged in direction of navigation of the vessel. Despes v. Stamped Rock Ferry Co., 342 U.S. 187, 190 (195).

.....

The Court rejects the defendants' contention that

the Jones Act does not apply because the accident occurred in the Norwegian territorial waters. The place of the wrongful act is only one of the eight factors to be considered in determining whether jurisdiction under the Jones Act is proper in the United States. Lauritzen v. Larsen, 345 U.S. 571, 583 (1953); Hellenic Lines, Ltd. v. Rholitis, 398 U.S. 306, 309 (1970). If there are sufficient contacts with the United States, Jones Act jurisdiction can be invoked where the accident occurred in another country's territorial waters.

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 440 (2nd Cir. 1959); Benedict, The Law of Admiralty, 1974 Ed., Vol. 1, Chapter VIII, §215, p. 13-50; Castanho v. Jackson Marine, No. 79-437 (E.D. Tex. 1980).

In this case the flag of the diving bell, the domicile of the defendant Ocean Systems entities, and the defendant shipowner's base of operations all point to the United States. Unlike Lauritzen v. Larsen and Hellenic Lines Limited v. Rhoditis, this is not a wholly foreign cause of action entirely between foreigners.

The decedents met their death aboard a vessel of United States flag and while in the employ of an American corporation, the Ocean Systems entities, maintaining a base of operations in Houston. The following passage illustrates the distinction between this case and Lauritzen v. Larsen, where the plaintiff was not allowed to bring a Jones Act lawsuit:

> American law will also be applied in actions brought on account of injuries suffered on American-flag ships, whether the plaintiffs are American or foreign, resident or non-resident, seamen, harbor-workers, passengers, guests or, for that matter, pirates. By taking out registry in this country, the shipowner consents in effect to the application of the law of the United States. This proposition has seemed so self-evident that it appears never to have been questioned. Gilmore and Black, The Law of Admiralty, p. 477 (1975).

The Court believes that the foreign nationality of the

decedents, the occurrence of the accident in Norwegian territorial waters, and the availability of foreign causes of action do not foreclose Jones Act jurisdiction; in view of the liberal construction to be given the Jones Act, the law of the vessels flag should be applied where the defendant shipowner is domiciled in the United States. DeZon v. American President Lines, 318 U.S. 50 (1943).

5. As owner of the diving bell, the defendant Ocean Systems entities had the absolute, non-delegable duty to provide a seaworthy vessel. Pioneer Steamship Co. v. Hill, 227 F.2d 262, 263 (6th Cir. 1955).

6. Where a seaman's death is proximately caused by an unseaworthy condition in the vessel, the Jones Act, the general maritime law, and the Death on the High Seas Act provide remedies to the decedent's survivors. The Seeandbee, 102 F.2d 577, 581 (6th Cir. 1939); Symonette Shipyards Ltd. v. Clark, 365 F.2d 464 (5th Cir.), cert denied 387 U.S. 908 (1967). Where death on the high seas is caused by negligent acts or omissions, the surviving spouse and children of the

seaman are provided with remedies under the Jones Act and the Death on the High Seas Act.

7. The leak in the in-hull filling caused the free ascent of the diving bell by allowing the drop weight to be loosened. A defect in the structure of a vessel creates an unseaworthy condition. Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944). The leak in the bell's in-hull fitting rendered the vessel unfit for its intended use. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 213 (1963). The leak in the diving bell resulted in the free ascent of the bell which proximately caused the death of decedents.

Defendant's diligence in attempting to discover leaks in the bell does not constitute a valid defense to the unseaworthy condition of the vessel. The Arizona v. Anelich, 298 U.S. 110, 121 (1936).

8. The failure to provide a correct predive checklist and failure to provide proper valve operational instructions constituted a negligent omission on the part of the defendant Oceans Systems entities. Also, the absence of a predive

checklist and operational instructions rendered the diving bell unseaworthy; this is particularly true in light of the presence of instructions that valves were to be closed prior to diving, while in fact all valves were to be open. Plaintiffs' Exhibit No. 1. A reasonably prudent diving bell owner would have provided proper operational instructions and a predive checklist to the divers using the bell. In order to be reasonably fit for its intended use, a diving bell must be accompanied by a predive checklist and proper operational instructions. * * *

END OF EXCERPTS

FROM

APPENDIX 7

APPENDIX 8

EXCERPTS FROM

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 84-2363

IN RE McCLELLAND ENGINEERS, INC., MCCELLAND ENGINEERS, S.A., McCLELLAND ENGINEERS, S.A. BHD., OCEANEERING INTERNATIONAL, INC., OCEANEERING INTERNATIONAL A.G., OCEANEERING INTERNATIONAL BRUNEI, CROSBY OFFSHORE SERVICES, LTD., ARABIAN AMERICAN OIL COMPANY, AND GLOBAL MARINE DRILLING COMPANY

AMENDED AND CORRECTED
RESPONSE OF RESPONDENTS TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TO THE HONORABLE JOE J. FISHER, JUDGE OF SAID COURT:

BENTON MUSSLEWHITE
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Houston, Texas 77002

OF COUNSEL:
LAW OFFICES OF BENTON MUSSLEWHITE, INC.

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FRIEDMAN & CHAFFIN

RICHARD SCHECHTER
525 Webster
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OF COUNSEL:
SCHECHTER, EISENMAN & SOLAR

I.

PRELIMINARY COMMENTS

Never in our many years of handling appeals have we ever seen a statement of facts by a party which is so distorted and incorrect as the one tendered by the Petitioners in this case. A Few examples:

1. In the "Statement", page 2 of the Peition, the Petitioners stated that the various vessels were "permanently assigned to waters offshore in various foreign sovereigns." This statement is totally incorrect as to all three of the vessels involved in this case (see discussion, infra.)

2. Petitioners state that "none of the vessels involved in this case is a traditional maritime vessel". This is another incorrect statement; the vessels in this case were not jack-up or semi-submersible rigs, which were the types of vessels involved in most of the so-called "rig cases", but were drill ships, barges, and diving vessels, much more similar to

"traditional maritime vessels" than to jack-up and semi-submersible rigs.

3. Respondents state at page 3 their brief that none of the vessels "produce revenues for the direct benefit of the corporate entities in the United States". This is totally misleading. As the evidence in each case indicates, all of the companies which operated the vessels were directly situated in the United States or were wholly-owned subsidiaries of parent companies who were situated in the United States and all of the profits of their operations around the world ended up on the consolidated financial statements of the parent companies.

4. The Petitioners state at page 3 of their Bried that the district court " expressly refused" to determine whether American or foreign law would be applied to the cases. This is a misstatement. The district court did not "refuse" to determine whether foreign or American law applied, but as the opinion indicates, after giving proper consi-

deration to the appropriate factors established by prevailing law and the law of this Court, properly deferred to the trial on merits the determination of disputed issues relevant to the choice-of-law determination,

This was necessary because such fact issues relevant to the choice-of-law determination "meshed" with facts issues relevant to the trial on the merits. Under such circumstances, this court has impliedly directed that such "meshed" issues be deferred, just as Judge Fisher did. See Vaz Borralaho v. Keydril, 696 F. 2d 379 (5th Cir.), reh en banc den., 710 F.2d 207 (5th Cir., 1983).

5. What is the grossest mischaracterization of the evidence can be found in footnote 2 of the Petitioner's Petition, at pp. 12-14. As can be seen below, most of the factual statements there made are not correct and do not accurately and objectively portray the true facts in this case.

II.

CORRECT STATEMENT OF FACTS

In order to set the record straight we have taken the time to prepare a detailed summary of the facts with respect to each of the three cases, and those summraies are attached hereto as Appendices A, B, and C, respectively. For the purposes of continuity we now note the essence of the facts in each of those cases before moving on to the reasons why the writ should not be granted.

A. Picco

William Wayne Picco is a Canadian citizen residing in Newfoundland who was severely injured on Oct. 25, 1980 while working as a seamen on board a blue water drillship, the Glomar Atlantic. The Glomar Atlantic is a American flag vessel owned and operated by Global Marine Drilling Co., Inc., an American corporation with its home office and base of operations in Houston, Texas. It was stipulated by the Defendants that the home port of the Glomar Atlantic is Galveston, Texas. The vessel is self-propelled and moves freely across the

the oceans to various drill sites all over the world. In 1979, the vessel traveled to drill sites off Louisiana, Newfoundland, and Yugoslavia Before moving to sites in the high seas off Newfoundland, the vessel drilled some wells off the coast of Labrador and had been in the port of Norfolk, Virginia for repairs, crew changes and supplies in late 1980. Indeed, while the Glomar Atlantic was in Norfolk, the Canadian crew arrived there to board the vessel and serve on it while it traveled to the drill site off the coast of Labrador. The evidence ie replete with testimony that the vessel was indeed controlled out of Houston, Texas and while Global Marine had a temporary office in Botwood Harbour, Newfoundland, the office was there only four months and had only a hand full of people in it. It is clear that the essential control of the vesse, through repeated telex, telephone, and other types of communications was out of Houston.

Most of the drilling of the Gobal Marine was done in waters beyond the territorial waters of Canada (although still in its "economic zone") and thus on the "high seas". An investigation of Mr. Picco's accident was undertaken by Charles Smith, his American tool pusher and also an employee of Global Marine out of Houston. While the titular employer of Mr. Picco was Crosby Offshore Services, Ltd., a Canadian corporation, it is clear that all Crosby did was to furnish crews to various American controlled vessels, such as the Glomar Atlantic, and the evidence is virtually undisputed that Mr. Picco was under the direct control of the Global Marine American supervisory personnel on board the Glomar Atlantic, including the American crane operator and tool pusher. At the least, there is a fact question as to whether or not Mr. Picco was the de factor Jones Act maritime borrowed employee of Global Marine at the time of the accident in question. That issue is

also an essential issue to the trial on the merits because Plaintiffs have sued Global Marine Drilling Company, Inc. as the de facto Jones Act employer of Mr. Picco.

Most of the essential witness are American. Not only is Mr. Charles Smith a material witness, but other Americans on board the vvessel who were witnesses to the accident are both American citizens and employees of Global Marine, and probably now are in the United States. This is particularly true since the vessel, soon after the accident in question, left Newfoundland (in fact it was in the process of leaving Newfoundland when the accident occurred) and sailed through the Panama Canal to off the coast of California in the Pacific Ocean. The fact that this vessel moved so often, and to such distant seas, is an indication that the vessel was substantially more like a traditional vessel than the jackup and semi-submersible rigs referred to in the "rig cases", which remained almost "permanently" offshore the territorial waters of one particular nation.

Operational and corporate contacts between the vessel, Glomar Atlanntic, and the Houston office were repeated, regular and substantial. Some of them are summarized in Appendix A. The supervisory personnel upon the rig, such as rig manager Steve Valsvig, were all Americans, on the payroll of Global Marine. The funding for the Global Marine operation came out of the Global Marine's Los Angeles office. Global's Houston office provided not only directions with respect to the vessel, but also accounting, personnel, safety, equipment, training, support, and other services for the local Botwood office. The rig manager's direct supervisor was Mr. King, a Global Marine officer located in Houston, Texas. The drilling reports were sent to Houston on daily basis and communications via telex and telephone, as indicated above, were made frequently between Houston the rig, and Botwood Harbour. There were limitations upon the authority of those upon the rig and in Botwood Harbour and any additional authority

had to come from Houston, Texas, according to the rig manager, Mr. Valsvig. The place of Mr. Picco's injury obviously was fortuitous in view of the Glomar Atlantic's continuous movements to and from United States waters and to other waters throughout the world.

B. Crow

Stephen Peter Crow, a citizen of New Zealand, was the titular employee of a wholly-owned subsiduary of Oceaneering International, Inc., ("OIC"). It is undisputed that OIC has its home office and nerve center in Houston, Texas. Under the law of Brunei, the territorial waters extend only three miles. This accident occurred far beyond the three mile territorial limits and thus on the "high seas" in that at the time of the accident the vessel upon which Mr. Crow was serving, the Pacific Protector, was outside the territorial waters of Brunei. The Pacific Protector was a diving vessel - a "traditional vessel". Mr. Crow was a diver - a "traditional seaman". It is undisputed that Oceaneering was in complete control of the diving portion of the vessel, the diving chambers,

and all other appurtenances and equipment which might relate to the diving operation. While Oceaneering did not own or operate the vessel as a whole, its exclusive control over the diving portion of the Pacific Protector is undisputed. The Pacific Protector flew a flag of convenience, Panama, and apparently was owned by a United Kingdom company. It was chartered to Brunei Shell Petroleum, a sister company to Shell Oil Company in the United States. The Pacific Protector is built and looks like a traditional vessel; is self-powered; and moves freely in the South China/Java Sea area. The vessel has now left those seas. The contract involving the diving operation was with OIC of Houston, Texas and it called for all divers to be employed by OIC.

As with the Glomar Atlantic, Americans on board the Pacific Protector were employed by the Houston-based company OIC and they controlled and directed the diving operations. They included Mr. Ed King, an American and lead diver, and others who, though not American, were employed

and/or directed by OIC out of Houston, Texas; namely, Mr. Michael Phillips and Mr. David Carter, both diving supervisors.

It is virtually undisputed that the de facto Jones Act employer of Mr. Crow at the time of the accident was OIC out of Houston, Texas. The overall direction of the diving activities around the world and the subsidiaries depended upon OIC for numerous operational as well as corporate services and direction. At least there is a fact question as to whether or not Crow was the maritime borrowed employee of OIC at the time of the accident in question.

Most of the witnesses relevant to this case can be found in the United States: (1) Mr. John Cornwall, who was in the decompression chamber with Mr. Crow on the first dive, is in Houston, Texas; (2) Mr. David Gorbett, who was in the control van during the dive, is an American from Minnesota; (3) Mr. Kirk Marshall, the medic, is an American and, according to our inforamtion, may be in Houston, Texas; (4) Dr. Gates Van Horn is a Houston Neurologist

who has examined and treated Mr. Crow (who was in the United States for quite a number of weeks); (5) The economist who will testify about the economic losses of Mr. Crow is Dr. Steven Wyatt from Houston, Texas; (6) Mr. Rob Petree is another diver with knowledge of diving procedures of Oceaneering as they relate to this case and he is an American from Galveston, Texas; (7) Dr. Austin is a clinical psychologist who has treated other divers and he will be an expert witness and is from Houston, Texas; and (8) hyperbaric medical experts, all of whom are Americans, include Dr. Unger of Clearlake, Texas and others. It should be noted that the Plaintiff has stipulated in all three cases that all of the expert witnesses, except treating doctors, will be American witnesses who will be readily available for depositions in the United States.

The Plaintiffs have specifically alleged that the defendants were guilty of negligence which took place in the United States in connection with the decompression aspects of the accident. The decompression procedures

that were set up for Oceaneering, including the establishment of diving tables, were accomplished from Morgan City, Louisiana and other cities in the United States including Houston. Those procedures were the primary cause of the damages of Mr. Crow. Thus, many, if not most, of the negligent acts which are the basis of this suit took place in the United States, including Louisiana and Houston, Texas. Moreover, Mr. Crow's understanding with Oceaneering was similar to the blue water seaman's contract in that it called for him to serve on any vessel in any area of the world. The understanding was the OIC could direct that he serve on any dividing vessel located in any area of the world, moving from one body of water to another. Thus, he, like the traditional blue water seaman, might have been fortuituously almost anywhere in the world where Oceaneering operates, at the time of the accident in question. As in the Picco case, the day-to-day operations of the vessels were controlled both from the central offices in Houston and the local offices in Singapore and Brunei. For a more detailed

statement see Appendix B.

C. Munusamy

Mr. Muigawah Munusamy is a Malaysian citizen who is now a resident of both Singapore and the United States and who intends to immigrate to the United States. He has testified and filed affidavits to the effect that he has an apartment in Houston, Texas; that he has received extensive medical treatment in Houston, Texas; and that he and his wife intend to permanently live in Houston, Texas; and that he has hired an American lawyer to assist him in his efforts to immigrate and to secure a work permit (if he can work again) in the United States. Mr. Munusamy was hired to work as a seaman on a barge nominally owned by McClelland Engineers S.A. (hereinafter refereed to as "MESA"). Apparently, the vessel flew the Panamanian flag. MESA, which is a Panamanian corporation, is obviously, admittedly and indisputably a "corporation of convenience" and the vessel flew a "flag of convenience". MESA is a wholly-owned subsidiary of McClelland Engineers Ltd. (MEL), a

Deleware corporation which is a wholly-owned subsidiary of McClelland Engineering, Inc. (MEI), a Texas corporation with its home and main offices in Houston, Texas. The evidence is undisputed (see deposition of Focht, Officer of the McClelland group) that MESA maintaned no operating office in Panama and had nothing there but a legal representative, and that MESA was formed and maintained in Panama for tax purposes. The board of directors of MESA is controlled by the Houston, Texas board majority, who are Americans with their offices and domicile in Houston, Texas (these include Mr. McClelland; Mr. Reynolds, Vice President-Finance; Mr. Cook, who is one of the managers, and others). The virtually complete centralization of the activities of McClelland is one of the most exhaustive we have ever seen. Mr. Focht was honest enough to testify about all of the finances, accounting, personnel services, payroll-handling, advertising, investigations, publications, group policies, preparation of employment contracts, research and

development, loans and other financial services and the like that were all handled out of the Houston office for all subsidiaries such as MESA. He admitted that MESA maintained an American in the Houston office by the name of Mr. Urban, who coordinated all of the activities of MESA in the United States and acted as a conduit for the repeated, weekly and daily, communications between vessels and branch offices such as the one in Dubai and the office in Houston. Mr. Focht testified how the McClelland Group performed virtually the same services all over the world and how the mode of operations and overall directional guides for the handling of such services were directed out of the Houston office and how all of the MESA companies would work together on pricing and the like and that most of the offices maintained around the world, such as the ones in Dubai and Saudi Arabia, were just simply "branch offices." As in the other cases, the supervisory personnel in control of

the vessel in question, which was a movable barge used for taking core samples out of the ocean bottom, the "Hole Master 1500", were americans who were on the payroll of MEI. These included Jerry McCoy, who was a rig supervisor, Keith Dave, David Myer, Steve Poole, David Walker, Rockey Brezin, and Phillip King. Thus, as in the other cases, Mr. Munusamy was the de facto Jones Act maritime borrowed employee of the Houston-based MEI. At the least, there is a fact question about that matter. Again, it is clear that the day-to-day operations of the vessel were at least jointly controlled from the various branch offices and the Houston office, which maintained centralized control over operations all over the world.

As to location of witnesses, once again the stipulation which we have made that all experts, other than initial treating doctors, will be American, easiily available for depositions in the United States, applies to this case. In additionn to Americans who were on the vessel or involved in the operation of

same and are in the United States and available for depositions, the witnesses include: Dr. M.D. Wallace who treated Munusamy in Saudia Arabia, but is an American; another person who has knowledge of the action is an Americian named Keith Dave, who was a driller and he apparently is in Dallas, Texas; Jerry McCoy, an American, apparently is in Houston, and he is a key witness because the accident was caused by his giving Munusamy a wrong sized "Kelly Pin", which thus caused the cable to come back and hit Munusamy. Munusamy has been treated by doctors in the United States which include Dr. Austin, a clinical psychologist; Dr. Norris, a physical rehabilitation physician; Ms. Pam Lewis, vocational rehabilitation expert; we will be using an economist out of the United States; and experts pertaining to maritime liabiilty will come, as per stipulation, from the United States. . . . . .